86-1050

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No.

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents.

PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I.

Whether a Federal Court Should in The Exercise of Its Habeas Jurisdiction Compel the Production of Secret Grand Jury Testimony For Its Own In Camera Review Where There is no Specific Claim Before it That The Testimony Contains Material the Disclosure of Which is Mandated by the Fourteenth Amendment or any Other Amendment Working Through It?

PARTIES TO THE PROCEEDING

Petitioners in the action are LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; RICHARD DUGGER, Superintendent, Florida State Prison; and JIM SMITH, Attorney General of the State of Florida. All Respondents are named in the caption.

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OPINIONS BELOW

Petitioners seek review of the decision of the United States Court of Appeals in Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986).

JURISDICTIONAL STATEMENT

This court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. §1254(1). The court below decided this case on August 14, 1986. Petitioners filed a petition for rehearing which the Court of Appeals denied September 26, 1986. The Court of Appeals issued as mandate its judgment in this case October 7, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §2254(a) provides:

"(a) The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws

or treaties of the United States.

Rule 2(c), 28 U.S.C. fol. §2254, provides:

> The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

STATEMENT OF THE CASE

A grand jury sitting in Pasco County Florida indicted both respondents for murder in the first degree. The state's case against both respondents rested primarily on the testimony of eyewitnesses to the crime. Three of those eyewitnesses testified in respondent Jent's trial. And, two of them tesified in respondent Miller's trial.(A.6,72,102) Petitioner's were both successful in having the state court order that the grand jury testimony of the witnesses be preserved. Both sought access to the testimony of these witnesses on the ground that their deposition testimony was inconsistent with accounts of the crime given to the police. The state court declined to order its disclosure. (A.6,72) Both respondents impeached these witnesses' trial testimony with deposition testimony. Both were, nevertheless, convicted and sentenced to death. (A.72)

The Florida Supreme Court affirmed both convictions and sentences on direct appeal. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 111 (1982); Miller v. State, 415 So.2d 1262 (Fla. 1981), cert. denied, 459 U.S. 1158 (1983). Both respondents sought relief on direct appeal, inter alia, on the ground that the trial court had abused its discretion in denying them access to the grand jury testimony of these witnesses. (A.7,73 n.5)

Following clemency proceedings, Florida's Governor signed death warrants for both respondents calling for their simultaneous executions. The results of the proceeding in the state courts afforded them no relief. The decisions on their applications for collateral relief in state court are reported as Jent v. State, 435 So.2d 809 (Fla. 1983) and Miller v. State, 435 So.2d 813 (Fla.

1983).

Having failed to stay their executions in state court, respondents sought relief in the United States District Court for the Middle District of Florida under the provisions of 28 U.S.C. §2254. (A.1,50) Both are in the custody of the State of Florida.

In district court, each respondent claimed, inter alia, that the absence of an in camera review by the state trial court of the grand jury testimony of the eye witnesses rendered their trials fundamentally unfair. (A.6,71) They each offered the district court the conclusion that grand jury testimony of these witnesses was exculpatory. (A.6,72) The factual basis given for this conclusion was that there were inconsistencies between statements given to police and their deposition testimony. (A.6,72) The district court considered both

petitioner's claims with regard to this issue and denied them both relief without an evidentiary hearing addressing this issue in interim orders which reserved other issues for an evidentiary hearing. (A.9,73) Respondents neither sought discovery of this material in district court nor asked the district court to conduct its own in camera review of the testimony.

In a per curiam opinion for a panel of Roney, Fay and Johnson, the Court of Appeals ruled respondents were entitled to an in camera hearing by the federal district court to determine whether they had shown a particularized need for these transcripts. (A.103-05) It ruled that the district court had erroneously used the particularized need standard instead of the lower standard that is sufficient to justify an in camera determination of whether that standard has been met.

(A.105) The Court of Appeal's decision on this issue fails to state any constitutional basis for its ruling. All cases to which the decision makes reference on this issue are decisions of less than constitutional magnitude.

REASONS FOR GRANTING THE WRIT

1) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE TEACHINGS OF THIS COURT ON THE OFFICE OF THE WRIT OF HABEAS CORPUS.

The decision of the Court of Appeals directs the district court to exercise power in excess of that granted by the habes statute for persons in custody pursuant to a judgment and sentence of a state court. Neither Section 2254 nor this court's decisions interpreting it suggest that it may do service as a "fishing expedition" so that a petitioner can go out in search of his case.

2) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND UNDERMINES THE RULES FOR THE ADMINISTRATION OF THE WRIT AND MAY MARK THE BEGINNING OF A TREND TO USE THE WRIT IN THE NATURE OF DIRECT APPEAL.

The proper officer of the writ is to afford a forum for relief to those who can state a prima facie claim that they are

being held in custody in violation of the constitution and laws of the United States. See e.g., Hill v. Lockhart, 106 S.Ct. 366 (1985) (specific allegation o prejudice needed to justify federal consideration of claim that counsel was not effective). For this reason Rule 2(c), 28 U.S.C. fol. §2254 requires that the petition set forth the grounds for relief asserted and the facts supporting those grounds. The decision of the Court of Appeals undercuts the requirements of the law as espoused by this Court and Congress.

This Court has already expressed its concern with the requirement that there be a factually specific claim before the district court in one case already set for consideration this term. McCotter v. Petty, No. 85-1656, cert. granted, June 30, 1986 [39 CrL 4087, 88] (Issue I). Because the decision in this case is

unprecedented, calls for action by the district court in excess of the jurisdiction conferred by 28 U.S.C. §2254, is plainly in conflict with both the presumption recognized repeatedly in recent years by a majority of this Court of finality and regularity which attaches to a state court judgment and sentence that has become final and is effectively a repudiation of the principle of comity that is to govern the administration of the writ, this issue should review it.

The decision of the Court of Appeals is in conflict with this court's ruling on the use of discovery tools in a habeas corpus case. Use of the discovery tools is limited to the discretion of the district court upon a showing of good cause. Rule 6(a), 28 U.S.C. fol. §2254 This court defined the appropriate circumstances for the use of discovery in Harris v. Nelson, 394 U.S. 286 (1969).

The decision authorizes discovery during the course of a habeas action as follows:

> [W]e conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief may use or authorize the use of suitable discovery procedures. . .
>
> **394 U.S. at 290.**

On its face, the decision below demonstrates that respondents have been unable to demonstrate a prima facie case for relief. And, it may mark the beginning of a trend in the Eleventh Circuit of directing evidentiary proceedings in death casees in the absence of a concrete factual claim of a constitutional violation. Consider, Porter v. Wainwright, No. 85-2832 (11th Cir. Nov. 17, 1986) (Hill, J. dissenting) (evidentiary hearing ordered despite fact that petitioner's claim showed only possible conflict of interest on the part

of counsel). The court should take this opportunity to put an end to the Eleventh Circuit's apparent tendency to transform the writ into a general purpose tool for supervising the courts of the states that fall within its territorial jurisdiction.

3) THE DECISION OF THE COURT OF APPEALS IS STRUCTURED IN SUCH A WAY AS TO DESTROY THE PUBLIC INTEREST IN FINALITY OF JUDICIAL PROCEEDINGS AND IN CONFLICT WITH DECISIONS OF THIS COURT ON THAT QUESTION.

The decision below directs the district court to behave as though it were the Florida Supreme Court reviewing respondents' judgments and sentences on direct appeal. The Court of Appeals' order is plainly inconsistent with presumption of finality and legality which has now attached to respondents' judgments and sentences. Autry v. Estelle, 464 U.S. 1 (1983) quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983). See also Kuhlmann

v. Wilson, 106 S.Ct. 2626-27 (1986); Hill v. Lockhart, 106 S.Ct. at 370.

As outlined above, the decision of the Court of Appeals is a dramatic departure from the customary use of the writ. By granting the relief it did, the Court of Appeals made a virtually unprecedented decision. Examination of the authorities to which the decision makes reference shows that none involve habeas or a federal court's review of a state court decision. The Court of Appeals' decision is an affont to Florida's interest in the finality of its judgments and sentences. The decision to order the district court to review the grand jury testimony in camera is nothing less than a deliberate rejection the presumption of regularity and finality that has attached to respondents' judgments and sentences. It is not only unprecedented in this respect but in

direct conflict with those presumptions as they have been created and recognized by decisions of this court previously mentioned. The radical and unprecedent nature of the relief granted is a compelling reason for this court to exercise its certiorari jurisdiction in this case.

CONCLUSION

WHEREFORE, petitioners ask for the granting of a writ of certiorari to the Court of Appeals in this case.

CERTIFICATE OF SERVICE

I, DAVIS G. ANDERSON, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the _____ day of December, 1986, I served three copies of the Petition for Writ of Certiorari on **Howardene Garrett**, Assistant Public Defender, Room 202, Pasco County Courthouse, 705 E. Liveoak, Dade City, Florida 33523, **David L. Roll**, Steptoe & Johnson, 1330 Connecticut Ave., N.W., Washington, D.C., 20036 and to **Eleanor Jackson, Piel**, 36 West 44th Street, New York, New York, 10036 by a duly addressed envelope with postage prepaid.

DAVIS G. ANDERSON
Assistant Attorney General

A P P E N D I X

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A P P E N D I X

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM RILEY JENT,

Petitioner,

vs. Case No. 83-860-Civ-T-13

LOUIE L. WAINWRIGHT, et al.,

Respondents.

_____/

MEMORANDUM OF DECISION

This cause comes before the Court pursuant to petitioner's 28 U.S.C. §2254 petition. The petitioner has been sentenced to death and was scheduled for execution on July 19, 1983. The original habeas petition was filed on July 15, 1983 and, by necessity, this Court stayed the scheduled execution in order that the petitioner's claims might be fully considered. The parties have now completely briefed their respective positions.[1]

1/ There was a very short time period between the Florida Supreme Court's review

FACTS SURROUNDING THE OFFENSE

On July 13, 1979, the badly burned body of a still unidentified young woman was found in a Pasco County game preserve. Six weeks later an indictment was issued by the grand jury charging the petitioner and his stepbrother, Ernest Miller, with premeditated murder. The petitioner and his stepbrother were convicted of first degree murder in separate trials.

The main evidence against the petitioner came from three eye witnesses to the crime - Carlena Jo Hubbard, Glenna Frye and Patricia Tirikaine. These witnesses testified that they were part of a group of eight people who had gathered for a party near a swimming hole on the Withlacoochee River in Pasco County. All those attending the party had been drinking to various degrees and there was

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of the petitioner's Rule 3.850 motion and the scheduled execution. The petitioner anticipated the Florida Supreme Court's denial of his motion. Consequently, the original petition contained both exhausted and unexhausted claims. All claims were exhausted subsequent to the decision by the Florida Supreme Court on the petitioner's Rule 3.850 motion. The petitioner has also filed a first amendment to his petition. That amendment as well as all memoranda in support of and in opposition to the petition have been considered.

some use of drugs. During the party the victim - tentatively identified during the trial as "Tammy" - arrived at the scene by some unknown means. Tammy began fighting with one of the group - Samantha Carver. The petitioner pulled Carver off of Tammy and began to beat Tammy with his fists. Codefendant Miller then joined in the beating which became increasingly vicious. Using a stick, Miller then beat the victim into unconsciousness.

Miller and the petitioner placed the victim in the trunk of Miller's car and returned to Miller's house. Tammy was taken out of the trunk and raped on the back of the trunk by the four men in the group, including the petitioner and Miller. The three testifying eyewitnesses watched the rape.

After the rape the victim was placed back in the trunk of the car and the entire group except for one member drove to the game preserve. The petitioner and Miller took the victim out of the trunk and laid her on the ground. Tammy tried to get up but the petitioner knocked her down. Miller then poured gasoline on the victim and set her on fire.

Besides the testimony of the eyewitnesses, the state introduced expert testimony of microscopic hair comparisons which identified hair retrieved from the scene of the crime as the petitioner's. The state also presented the testimony of the petitioner's cellmate, James Ray Boone, who stated that the petitioner had told him of the murder while in prison.

PROCEDURAL HISTORY OF THE PETITION

Following a jury trial the petitioner was convicted of first degree murder on December 21, 1979. On advice of his trial counsel, the petitioner did not testify at either the guilt or sentencing phase of his trial. Following the jury's recommendation, the trial judge sentenced the petitioner to death on January 30, 1980.

The petitioner appealed to the Florida Supreme Court which affirmed both the conviction and sentence and subseqently denied the petitioner's request for a rehearing. See Jent v. State, 408 So.2d 1024 (Fla. 1981). The United States Supreme Court denied a petition for certiorari on June 7, 1982.

In March, 1983 the petitioner filed a Motion to Vacate, Set Aside or Correct Conviction and Sentence pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Sixth Judicial Circuit for Pasco County, Florida. On June 24, 1983, the trial court denied the petitioner's motion in part but ordered a hearing on the petitioner's claims of ineffective assistance of counsel. After a July 12th hearing on this issue, the trial court denied the petitioner's Rule 3.850 motion. The Governor of the State of Florida had signed a warrant for the execution of the petitioner on July 19, 1983. Therefore, in order that this Court be given time to review the instant petition, the Court stayed the execution on July 18, 1983 - the day the petition was filed. The petitioner presents eight grounds for relief in his petition. There is no dispute that the petitioner has exhausted all of his state remedies for his claims. Thus, this Court will address those claims in sequence.

I.

The petitioner's first claim for relief is that the trial court unconsti-

tutionally deprived him of the allegedly exculpatory and inconsistent grand jury testimony of the three main prosecution witnesses. Prior to trial the petitioner moved for the transcripts of the grand jury testimony of the state's three eyewitnesses to the crime. As the reason for his request the petitioner cited the inconsistencies between the witnesses' deposition testimony and their statements given to the police. The petitioner thus argued that the transcripts were needed to impeach the state's witnesses. The trial court denied the motion and also denied the petitioner's motion for the Court's in camera review of the grand jury transcripts which the petitioner argued was necessary in order to assure the state's compliance with Brady v. Maryland, 373 U.S. 83 (1963).

The petitioner presented this claim to the state courts in his Rule 3.850 motion. However, the state trial court rejected the petitioner's arguments and the Florida Supreme Court affirmed, holding that the petitioner had failed to lay a proper predicate for his motion and that the petitioner's effective use of the

witnesses' inconsistent deposition testimony on cross-examination "obviated the need for their prior [grand jury] testimony."[2] Jent v. State, 408 So.2d 1024, 1027-28.

There is no federal constitutional right to the discovery of grand jury transcripts. See United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). Thus, the only federal issue before this Court is whether the petitioner's rights under Brady v. Maryland supra were violated by the failure of the state trial court to release the grand jury transcripts. Alternatively, this Court must consider whether the failure of the state court to review the transcripts in camera in order to determine whether they contained Brady material violated the petitioner's constitutional rights.

2/ The Florida Supreme Court determined that no violation of the state criminal discovery laws, specifically Fla. Stat. §905.27, occurred due to the trial court's denial of the petitioner's motion for the production of the transcripts. This interpretation of the state law by the highest court of the state is not subject to review under 28 U.S.C. §2254.

The necessity for secrecy of grand jury proceedings precludes the right of unrestricted access to grand jury transcripts. See Douglas Oil Co. v. Patrol Stops Northwest, 441 U.S. 211, 223 (1979). The "indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity" which is shown with particularity. United States v. Proctor & Gamble, supra at 682 (citations omitted). In the instant case the particularized need cited by the petitioner was his desire to more effectively cross-examine the state's witnesses and to determine if the transcripts contained exculpatory information. However, the petitioner was not without resources for impeachment. The petitioner deposed all of the state's witnesses before trial and trial record reveals that the defense extensively cross-examined the state's witnesses regarding their motives for testifying and the inconsistencies between their trial testimony and their deposition testimony. The petitioner's cross-examination of the state's eyewitnesses was unfettered and aided by their inconsistent depositions.

Thus, this Court cannot conclude that the petitioner's particularized need for the transcripts outweighed the need for grand jury secrecy.

The Court also concludes that the petitioner has failed to show with particularity the usefulness or materiality of the grand jury transcripts. The prosecution stated that the transcripts did not contain any exculpatory information. The fact that the grand jury testimony is alleged by the petitioner to contain some inconsistencies does not, without some factual support, convince this Court that the trial court abused its discretion in deciding not to review the transcripts in camera. See United States v. Gonzalez, 466 F.2d 1286 (5th Cir. 1972). Accordingly, the Court DENIES the petitioner's first claim for relief.

II

The petitioner's second claim for habeas relief is based on the trial court's denial of the petitioner's motion for a continuance in order to give defense counsel an opportunity to depose Samantha Carver. Four days before his scheduled

trial, the petitioner subpoenaed Ms. Carver who was an eyewitness to the events surrounding the murder. However, at trial neither the state nor the petitioner called Ms. Carver to testify. Ms. Carver entered into a plea agreement with the state immediately before the petitioner's trial but was not sentenced until after the trial. The petitioner basically argues that he was denied Ms. Carver's allegedly exculpatory testimony because it would have been futile to call Ms. Carver at trial when she would have asserted her Fifth Amendment privilege until after her sentencing. In light of those facts, the petitioner asserts that the trial court's failure to grant the petitioner's motion for a continuance, denied him his Fourteenth Amendment right to "present his own witnesses and establish a defense." Citing Washington v. Texas, 388 U.S. 14, 19 (1967). In support of his claim the petitioner presents the affidavit of Ms. Carver which is exculpatory with regard to the petitioner and not incriminatory with regard to Ms. Carver.

Lying beneath the petitioner's assertions is the fact that the petitioner never did call Ms. Carver to testify. Her affidavit is not incriminating and there is no apparent reason based on that affidavit why Ms. Carver would refuse to testify. Indeed, based on her affidavit there was no reason for Ms. Carver to plead guilty to the charge of being an accessory after the fact to Tammy's murder.[3] Ms. Carver's affidavit states that no murder occurred at the riverside party. The trial court was presented with the petitioner's speculations that Ms. Carver's testimony would be favorable to the petitioner and that she would so testify after her sentencing. However, if Ms. Carver's testimony was to have been consistent with her affidavit, there was no need for petitioner to fear her assertion of the Fifth Amendment. In addition, even if the trial court had continued the trial there was no guarantee that Ms. Carver would not have invoked the Fifth Amendment. Ms. Carver was not given

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3/ For a discussion of the content of the Carver affidavit see note 7 and accompanying text infra.

immunity by the state and double jeopardy would not have prevented her prosecution for other criminal acts surrounding Tammy's murder - including the prosecution for first degree murder. Under these considerations, the trial court was well within its discretion in denying the motion to continue which was based on the petitioner's speculations.[4] Accordingly, the Court concludes that the petitioner suffered no due process violation by the denial of his motion to continue.

4/ At his Rule 3.850 hearing, the petitioner declined to call Ms. Carver as a witness in support of his claims of ineffective assistance of counsel due to counsel's failure to present her testimony and prosecutorial misconduct in connection with the motion for continuance. The respondent thus argues that the petitioner's failure to present Ms. Carver for cross-examination was a deliberate by- pass of a state court proceeding and has resulted in a procedural default on all claims supported by Ms. Carver's testimony. See Wainwright v. Sykes, 438 U.S. 72 (1977). The Court recognizes the persuasiveness of this argument but determined that the petitioner's continuance claim should be dismissed on the merits.

III

The petitioner's third claim for relief alleges that he was denied due process by the trial court's admission into evidence of a hair sample which was identified as the petitioner's. The petitioner first argues that the hair sample was discovered under dubious circumstances. Specifically, three days after the body had been removed, a county homicide detective discovered a clump of hair at the site where the victim's body was found. During that three day period there had been numerous other police investigators in the area. The hairs were sent to the state's crime laboratory in Tallahassee where they were analyzed by the state's hair expert. The crime laboratory concluded that most of the hairs came from the victim. However, the crime laboratory determined that one hair was unidentified. Upon comparison of the unidentified hair and a sample of the petitioner's hair, it was determined that the hair found at the crime scene was microscopically identical to the petitioner's hair. The state's expert so testified at trial. The expert, however,

also testified that hair analysis was not a basis for positive identification and upon cross-examination the expert conceded that the microscopic comparison of hair samples was far from conclusive in this case.

The petitioner presented this claim for relief in his second Rule 3.850 motion and the state court rejected the argument. The Florida Supreme Court found that the trial judge was correct in determining that hair comparison analysis was sufficiently reliable to be admitted into evidence. The Florida Supreme Court based its decision on the fact that the hair expert repeatedly conceded that hair comparison was not absolutely reliable. Thus, the Supreme Court found that it was within the province of the jury to accord whatever weight they felt the hair comparison deserved.

A state court evidentiary error does not justify federal habeas relief unless the error results in the trial's fundamental unfairness. Dickson v. Wainwright, 683 F.2d 348 (11th Cir. 1982). Thus, this Court must examine the petitioner's claim to determine first if

it was an error for the trial court to admit the hair comparison testimony. If the Court finds that it was error to admit the testimony, the Court must then determine whether that error resulted in fundamental unfairness. The erroneous admission of evidence is fundamentally unfair if it was "material in the sense of a crucial, critical highly significant factor" in the defendant's conviction. Id. at 350 (quotations omitted).

The microscopic analysis and comparison of hair samples is an accepted scientific test for use as evidence. See Peck v. State, 395 So.2d 492 (Fla. 1981); United States v. Brady, 595 F.2d 359 (6th Cir. 1979). The petitioner's argument that the microscopic hair comparison is scientifically unreliable is meritless. Although the microscopic hair comparison is not one hundred percent conclusive, it can be relied upon to a relatively high degree of accuracy. Thus, the trial court did not abuse its discretion in recognizing the proven scientific reliability of the test.

However, the petitioner also asserts that the evidence collecting process and

the chain of custody of the hair sample were so inconsistent and unreliable as to render the admittance of the hair sample error. The trial court listened to a proffer of the hair comparison expert's testimony and after hearing argument from both parties concluded that the defendant's objections regarding the evidence collecting process and the hair sample's chain of custody affected the weight of evidence but not its admissbility. As noted by the Florida Supreme Court, a trial judge has wide discretion in admitting evidence and unless there clearly was an abuse of that discretion, the trial court's ruling will not be disturbed. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Most importantly for this Court, a federal court considering a habeas petition will only review a state court's evidentiary rulings to determine if the alleged error was of such magnitude as to deny fundamental fairness to the criminal trial. Nettles v. Wainwright, 677 F.2d 410 (5th Cir., Unit B (1982). In the instant case the trial court, after hearing argument on the issue, concluded

that the alleged problems with hair samples were not sufficient to prevent its introduction. Upon examination of the record this Court concludes that the trial court's admission of the hair comparison was not error and even if it was error to admit the hair comparison, its introduction was not so critical as to deny the petitioner a fundamentally fair trial. Accordingly, the Court finds this claim to be without merit and it is DENIED.[5]

IV

The petitioner's fourth claim for relief is that he was denied due process

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5/ The state produced three eye witnesses who testified that the defendant murdered the victim. Thus, it can not be said that the hair comparison was a crucial piece of evidence which resulted in the petitioner's conviction. The defense extensively cross-examined the prosecution's hair comparison expert and the expert repeatedly conceded the potential flaws in the microscopic testing. In light of the three eye witnesses' testimony and the arguably equivocal nature of the hair comparison, the allegedly erroneous introduction of the hair sample could not have resulted in a fundamentally unfair trial.

of law by the failure of the trial court to define the underlying felony of "sexual battery". Sexual battery is an element of the crime of felony murder which was one of the crimes upon which the trial court instructed the jury. Specifically, the trial court instructed the jury that it could find the petitioner guilty of premeditated murder and/or felony murder. However, the trial court did not instruct the jury as to the definition of the crime of sexual battery which is the underlying felony upon which the jury could have based a verdict of felony murder. A general verdict was used in the petitioner's case and thus it is not possible to be absolutely certain whether the verdict was based on the felony murder instruction or the premeditated murder instruction.

The petitioner did not object to the omission of the underlying felony instruction at trial. Nonetheless the Florida Supreme Court considered this claim on direct appeal. In light of the overwhelming evidence of premeditation and the state's almost total reliance on premeditation in the presentation of the

case and its argument, the Florida Supreme Court found the failure to instruct on the underlying felony to be harmless. See Jent v. State, 408 So.2d 1024, 1031 (Fla. 1981), citing Knight v. State, 394 So.2d 997 (Fla. 1981).

Any petitioner who brings a federal constitutional claim to a federal court after a state procedural default must demonstrate both cause excusing his procedural default and actual prejudice resulting from the alleged constitutional violation before obtaining relief. Wainwright v. Sykes, 433 U.S. 72 (1977). "The failure to object [at trial] generally indicated that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair." Engle v. Isaac, 456 U.S. 107, 136, n.1 (1982) (Stevens, J., concurring in part and dissenting in part).

In the instant case the petitioner concededly did not object to the jury instruction and offers no excuse for that default. Thus, under Wainwright v. Sykes,

supra this Court is precluded from considering whether the jury instruction was constitutionally deficient. The Florida Supreme Court did, however, address the merits of the petitioner's claim and although the Court finds that the petitioner procedurally defaulted on his claim, the Court will address the merits of the claim.

The standard of review in a collateral proceeding of an allegedly erroneous jury instruction is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned. Henderson v. Kibbe, 431 U.S. 145 (1977). As noted by the Florida Supreme Court, the entire thrust of the state's case against the petitioner was premeditated murder. Closing arguments of both counsel were primarily directed towards the premeditated murder charge. Applying the standard articulated in Kibbe, this Court's review of the omitted instruction within the context of the entire trial

leads it to conclude that the omitted instruction did not result in a constitutionally infirm conviction. Accordingly, the petitioner's fourth claim is DENIED as meritless.

V

The petitioner's fifth claim in support of his request for habeas relief is that the trial court failed to instruct the jury on the possibility of considering non-statutory mitigating circumstances at the penalty phase of their deliberations. The trial court instructed the jury that they could consider the mitigating circumstances enumerated in Florida's death penalty statute - Fla. Stat. §921.141. The trial court did not expressly instruct the jury that they could consider non-statutory mitigating factors although the court's instructions did not tell the jury to preclude their consideration. The instructions were silent on the issue.

As with the alleged unconstitutional jury instruction in claim four, the petitioner did not object to the court's sentencing instruction. In fact, the

petitioner's trial counsel explicably stated that he was satisfied with the court's instruction. Thus, the petitioner must demonstrate both cause and prejudice as to the alleged constitutionally infirm jury instructions before he may gain federal habeas relief. See Wainwright v. Sykes, supra.

In evaluating a trial court's instructions, the Court must determine the interpretation a reasonable juror might give the words of the instruction in question. Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury pass constitutional muster. Davis v. McAllister, 631 F.2d 1256, 1260 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981).

The fundamental issue in this claim is whether the jury that recommended death for the petitioner perceived that they were precluded from considering nonstatutory mitigating factors. The Court is spared an in depth analysis of this issue because the Eleventh Circuit has already considered the identical issue in almost identical circumstances in Ford v. Strickland, 696 F.2d 809, 811-13 (11th

Cir. 1983). In Ford, the Court reviewed a sentencing instruction that like the instant instruction was basically a reiteration of Fla. Stat. §921.141. The Ford Court determined that the statute's failure to explicitly restrict the jury's consideration of nonstatutory mitigating factors when compared to the statute's explicit restriction of aggravating factors would lead a jury to conclude that all mitigating factors, including those outside of the statute could be considered. Ford is indistinguishable from the instant case and for the reasons articulated in Ford, the Court finds this claim of the petitioner to be without merit. Accordingly, it is DENIED.

VI

In his sixth claim for habeas relief the petitioner alleges that misconduct by law enforcement personnel and government prosecutors so pervaded the state's prosecution of the case that he was denied due process. Specifically, the petitioner alleges that the state pressured and frightened witnesses; the state failed to investigate and to disclose to defendant's

counsel evidence that identifies the victim and incriminates another person as the murderer of Tammy; and lastly that the state interferred with defendant's counsel in his defense of petitioner.

The state argues that the petitioner is procedurally barred from asserting his claims of prosecutorial misconduct because he failed to exhaust those claims in the state proceedings. However, it is clear from the trial court's order denying the petitioner's Rule 3.850 motion and the Florida Supreme Court's affirmance of that denial, that the petitioner exhausted at least some of his claims of prosecutorial misconduct which were not addressed on the merits by the state courts. However, the petitioner did present those claims to the state trial court in his three supplemental Rule 3.850 motions. The first of these supplemental motions was filed on July 6, 1983. The second and third supplemental motions were filed on July 12, 1983 - the day of the hearing on the petitioner's Rule 3.850 motion. The trial court refused to allow the amendment of the petitioner's original Rule 3.850 motion and thus did not consider the merits

of the claims contained in the supplemental motions.[6] The state argues that the claims presented in the supplemental motions were not exhausted.

However, as the claims alleged in the supplemental motions were presented to, but not addressed by the state court, this Court holds that the petitioner is not procedurally barred from presenting those claims in this federal action. Cf. Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982) (exhaustion is not a matter of subject matter jurisdiction but exists as a matter

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6/ The trial court in its ruling on the petitioner's Rule 3.850 motion specifically stated:

> The prayer of the defendant for post conviction relief is hereby denied as to those issues raised in those portions of his motion styled "Points 1A, 1B, 1C, 1D" including Points "2" and "3" under "D" (these sections related to petitioner's claim of prosecutorial misconduct). Those issues were all raised and determined on appeal to the Florida Supreme Court and the defendant may not now raise those issues collaterally. (CR.244)

of respect to the state courts, and as such, may be waived); Carr v. State of Alabama, 586 F.2d 549 (5th Cir. 1978) (a federal habeas claim raised but not addressed by the state court is exhausted).

The petitioner asserts a number of facts and factual inferences in support of his allegations of prosecutorial misconduct. Although not presented in this manner by the petitioner, for purposes of clarity the Court has divided the petitioner's broadly stated claims into four separate instances of alleged prosecutorial misconduct. The Court will address each in turn.

1. In the petitioner's first claim of prosecutorial misconduct he notes that the victim was never identified and the state did not attempt to introduce any evidence relating to the identity of the victim at trial. However, the family of a young woman named Gail Bradshaw who had disappeared around the time of the murder and who is still missing, attempted to establish whether or not the victim was Ms. Bradshaw. The Bradshaws contacted the Pasco County Sheriff's Department concerning the possibility of Gail Bradshaw

being "Tammy". The Bradshaws were shown police pictures of Tammy's corpse but were unable to identify "Tammy" as Gail Bradshaw. The state made no mention to the petitioner of the Bradshaw's efforts prior to trial. Besides claiming that the state covered up the Bradshaw's investigation, the petitioner alleges that the state did not fully cooperate in assisting the Bradshaws in their efforts to determine whether the victim was Gail Bradshaw.

Subsequent to trial, the petitioner did learn of the Bradshaw's effort and moved for a new trial based on recently discovered evidence. At the hearing on the petitioner's motion Tommy Bradshaw, Gail's brother, testified that the photograph of the victim and victim's shoes, which had been introduced at trial, bore a resemblance to his sister and her shoes. However, neither Ms. Bradshaw's sister or father could confirm Tommy Bradshaw's identification.

The gravamen of this claim of prosecutorial misconduct is that the respondent suppressed exculpatory information in violation of Brady v.

Maryland, 373 U.S. 82 (1963). However, the fact that her family was looking for the disappeared Gail Bradshaw is not exculpatory. Undisclosed evidence is exculpatory if it creates a reasonable doubt of guilt that did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976); see also United States v. D'Antignac, 628 F.2d 428 (5th Cir. 1980). Under the standard of Agurs the state was not obliged to inform the defense that a worried family was concerned that the victim may have been their daughter. The petitioner fully presented the Bradshaw's testimony at the hearing on his motion for a new trial and that testimony is inconclusive. Except for Gail Bradshaw's brother, the Bradshaws were unable to positively identify Tammy as Gail. In light of the irrelevance of the identity of the victim to the petitioner's conviction and the overwhelming evidence of guilt, the failure of the state to inform the petitioner of the Bradshaw's inquiries was not a violation of Brady.

2. The petitioner's second claim of prosecutorial misconduct involves the state's alleged bad faith opposition to

the petitioner's motion to continue his trial in order to obtain the testimony of Samantha Carver. The petitioner argues that the State unconstitutionally denied the petitioner an exculpatory witness. In support of this claim in his original Rule 3.850 motion the petitioner submitted the affidavit of Ms. Carver which states that the riverside party occurred on July 11, 1979, not July 12, 1979 and that no murder took place. Ms. Carver also states that she would have testified on behalf of the petitioner but was advised not to testify by her attorney.

While the trial court denied this claim as having been presented to the Supreme Court of Florida on direct appeal, the petitioner couched his Carver claim before the Florida Supreme Court in terms of the trial court's abuse of discretion in denying the motion for a continance and ineffective assistance of counsel in not diligently pursuing the motion. See Jent supra at 1028. However, even when presented in a new theory to this Court, the petitioner's claim based on the failure of Carver to testify cannot stand. The only allegation of prosecutorial misconduct is

that the state offered Ms. Carver a plea bargain and she accepted. Ms. Carver was free to testify at the petitioner's trial but she declined to do so based on the evaluation of her own best interests. There is no prosecutorial misconduct in preventing her testimony.

Even if the Court considered the Carver affidavit new evidence, the petitioner's claim must fail. "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Townsend v. Sain, 372 U.S. 293, 317 (1963). Accordingly, the Court finds this claim of prosecutorial misconduct to be without merit.[7]

7/ The Court notes that Carver's affidavit is inconsistent with her admission that she participated in the murder of Tammy. Carver was sentenced to five years for that participation. Thus, her affidavit that the murder did not occur is irreconcilable with her admission of guilt. Carver explains this inconsistency by stating in her affidavit that she plead guilty to the charge of accessory after the fact to Tammy's murder because the state had threatened to prosecute her with first degree murder.

3. The petitioner's third claim of prosecutorial misconduct alleges that the testimony of the petitioner's cellmate, James Ray Boone, was procurred by prosecutorial misconduct. Boone testified that while in jail the petitioner admitted his participation in the murder. The petitioner alleges that the state elicited Boone's testimony by offers of leniency for Boone's own crime.

The petitioner asserted this ground in his second supplemental 3.850 motion. Thus, as noted, it was not considered on the merits by the state courts. An independent review of the record, however, fails to support the petitioner's allegations. At the petitioner's trial, Boone explicitly testified that he was not expecting leniency in return for his testimony. The petitioner had ample opportuity to cross examine Boone regarding his motivation for testifying. The only basis for the petitioner's claim is that the sentencing court was allegedly informed of Boone's testimony in the petitioner's case. There is no evidence that Boone's sentencing court even considered this fact when sentencing Boone.

In sum, whatever the characterization of the petitioner's alleged facts, they do not rise to the level of a constitutional violation. Accordingly, this claim is without merit.

4. The petitioner's fourth claim of prosecutorial misconduct involves the petitioner's motion for a new trial and a subsequent new development. In preparation for the hearing on his moton for a new trial the petitioner filed the affidavits of Tina Marvin, Gail Bradshaw's friend, and Elmer Carroll. The affiants stated that "Tammy" was actuallly Gail Bradshaw and that Ms. Bradshaw had been beaten, burned and murdered by her boyfriend, Bobby Dodd. The murder allegedly took place in the Richloam Game Preserve on July 12, 1979 - the place and date of Tammy's murder - and was witnessed by Carroll. However, at the hearing on the petitioner's motion both Marvin and Carroll recanted their sensational affidavit testimony. Carroll stated that he was not at the game preserve on July 12, 1979 and that he had not seen anything violent happen to Gail Bradshaw. Corroborating Carroll's recantation, Marvin

stated that Carroll had never told her that Gail Bradshaw was murdered. Upon questioning by the state as to why Marvin had falsely testified in her affidavit, Marvin stated she had done so to help Miller, the petitioner's codefendant.

In support of his first supplemental Rule 3.850 motion the petitioner presented a second Tina Marvin affidavit in which Ms. Marvin reaffirmed her original afidavit testimony, i.e., that Elmer Carroll had told her that Gail Bradshaw had been killed by Bobby Dodd in his presence. Marvin's second affidavit also asserts that immediately prior to the hearing on the petitioner's motion for a new trial state officers had coerced her into repudiating her original affidavit. As noted, the state court did not address the merits of this allegation.

If a state court has not held an evidentiary hearing to develop facts necessary to resolve an issue raised in a habeas petition, a federal court has the duty to conduct such an evidentiary hearing. Guire v. Fortenberry, 661 F.2d 496, 500 (5th Cir. 1981) (en banc). However, if the petitioner failed to

develop those facts through "inexcusable neglect" or a deliberate bypass of the state proceeding then a federal evidentiary hearing is not required. See Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). "In most cases, a deliberate bypass must itself be proved by an evidentiary hearing." Buckalew v. U.S., 575 F.2d 515, 519 (5th Cir. 1978). The petitioner did not present his first supplemental Rule 3.850 motion and its supporting Marvin affidavit until after the state court had addressed the merits of the petitioner's motion. However, from the record the Court cannot determine whether the petitioner deliberately bypassed the state's post trial procedures. Accordingly, the Court will conduct a hearing on the petitioner's allegations of prosecutorial misconduct with regard to the Marvin - Carroll recantation. However, as a prelude to a hearing on the merits of the claim, the petitioner must first establish that he did not deliberately bypass the state's post trial procedures.

VII

The petitioner's seventh argument in support of relief is that he received unconstitutionally inadequate representation of counsel at trial. The petitioner presented six specific claims of deficiency on the part of his appointed trial counsel in his original petition. These claims are:

(A) Failure to obtain a defense forensic expert on the cause of death;

(B) Failure to obtain a defense forensic expert on the scientific accuracy of the hair comparison;

(C) Failure to obtain an expert on the relation of drug use and witness credibility;

(D) Failure to obtain a second psychiatrist to aid the petitioner's search for mitigating factors and failure to adequately investigate potential mitigating factors;

(E) Failure to object to jury instructions;

(F) Conflict of interest by petitioner's first defense counsel, Jack Hoogewind;

(G) Inadequate cross-examination of the state's witnesses.

The state court conducted a hearing on all of the petitioner's ineffective assistance of counsel claims. The petitioner's trial counsel testified at the hearing and upon consideration the state court rejected the petitioner's claims in a detailed opinion. See Order Denying Motions to Vacate and Motions for Stay of Execution, July 13, 1983. The Florida Supreme Court affirmed that Order. See Supreme Court Per Curiam Opinion.[8]

8/ As noted, the petitioner has moved to hold an evidentiary hearing on all of his claims, including his claims of ineffective assistance of counsel. However, before a federal court must afford an evidentiary hearing on an exhausted state habeas claim the petitioner must allege that a "material" fact was not developed at the state court hearing and that the failure to develop the fact was not attributable to the petitioner's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

In the instant case, before ruling on his Rule 3.850 motion, the state court afforded the petitioner a comprehensive hearing on his ineffective assistance of counsel claim. The hearing included the petitioner's presentation of expert testimony. Judge Cobb made detailed findings on the competency of the petitioner's counsel which this Court may adopt without

The Sixth Amendment right to counsel carries with it a corollary that guarantees the right to effective counsel. Washington v. Strickland, 683 F.2d 1243 (5th Cir. Unit B, 1982). A habeas petitioner asserting a claim of ineffective assistance of counsel must prove by a preponderance of the evidence that (1) his counsel was in fact ineffective and (2) that his counsel's ineffectiveness caused "actual and substantial prejudice to his case." Washington supra at 1250; Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Constitutionally effective counsel is not errorless counsel, nor counsel judged ineffective by hindsight but counsel which was reasonably effective as judged by the totality of circumstances in the entire record. Washington v. Watkins,

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affording the petitioner any further opportunity to produce evidence. See Ford v. Strickland, 696 F.2d 809, 825 n.1 (11th Cir. 1983) (Tjoflat, J., concurring). The petitioner does not allege the omission of any material fact from the record. Therefore, as the Court has adopted Judge Cobb's findings of fact, no federal evidentiary hearing is required on the ineffective assistance claim. Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983).

655 F.2d 1346 (5th Cir. 1981).

Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings. In his supplemental memorandum in support of his motion the petitioner in a cursory manner lists exceptions (2), (3), (6), (7) and (8) to section 2254(d) as being applicable to this case. The petitioner does not provide details as to what manner the state court's hearing on the ineffective assistance claim was deficient. In his supplemental memorandum, the petitioner in essence argues that the state court was wrong in its conclusions. The petitioner does not argue that the hearing was deficient or that he was not allowed to

produce evidence in support of his claims. See Petitioner's Supp. Memo at 53-58.

The Court's review of the record of the state court's hearing on the petitioner's ineffective assistance claim leads the Court to conclude that none of the section 2254(d) exceptions apply. The petitioner's unsupported claim that the state court hearing was inadequate does not establish an exception to section 2254(d). The petitioner was given unfettered discretion to establish his claim of ineffective assistance at the state court hearing. The petitioner presented the live testimony of his trial counsel, an expert trial attorney and an expert medical examiner. The record indicates that there was virtually no restrictions on the development of the petitioner's claim. Bald assertions without citations to specific instances of deficiency do not establish an exception to section 2254(d). As the petitioner received an adequate hearing, the state court's findings are presumptively correct.[9]

9/ In his pleadings in support of his petition, the petitioner tends to blur his state court claims for ineffective assistance of counsel with those ineffective assistance claims presented in the

In order to overcome that presumption, the petitioner must establish that the state court's findings are "not fairly supported by the record." 28 U.S.C. §2254(d)(8). Under §2254(d), however, the state court findings are entitled to a high measure of deference and "[t]his deference requires that a federal habeas court must more than simply disagree with the state court before rejecting its factual determinations." Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983).

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instant petition. However, only the six claims of ineffective assistance of counsel presented in the original petition and the one claim of ineffective assistance presented in the amended petition are before the Court. All other claims, including those in the three supplemental Rule 3.850 motions will not be considered as they are not part of the instant petition and amended petition. The six claims of ineffective assistance presented in the original petition were specifically considered by the state court in its hearing on the petitioner's Rule 3.850 motion.

(A) Petitioner's first claim of ineffective assistance of counsel is that trial counsel failed to move for a defense forensic expert on the cause of death. The petitioner supports this claim with the testimony of Dr. Ronald Wright an experienced medical examiner who testified at the state court ineffective assistance hearing that the victim was probably not alive when immolated. Dr. Wright's testimony would arguably have contradicted the testimony of the state's medical examiner - Dr. Nowab. Dr. Nowab testified that the victim was probably alive when burned.

However, at the state court hearing the petitioner's trial counsel testified that he believed the equivocal nature of Dr. Nowab's report was beneficial to the defense. Thus, petitioner's trial counsel made a tactical decision to forego another possibly more prejudicial opinion. In addition, as noted by the state court judge, the medical examiner testified at the petitioner's trial that the victim was unconscious and beyond sensitivity to pain when immolated. Arguably, this fact lessened the heinous nature of the crime.

In reviewing a claim of ineffective assistance of counsel, this Court will not second guess a legitimate tactical decision at trial. Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). Accordingly, this claim is without merit.

(B) The petition next claims that defense counsel was ineffective because he did not obtain a forensic hair expert. However, during the defendant's cross-examination of the state's hair expert the expert repeatedly conceded the non-conclusiveness of the hair comparison. Thus, the petitioner obtained by cross-examination whatever benefit his own hair expert would have provided. Under these circumstances, it is difficult to see how the defendant's counsel's failure to retain a hair expert was ineffective let alone establish "actual and substantial prejudice to his case." Washington supra at 1250.

(C) The petitioner's third claim of ineffective assistance stems from his trial counsel's failure to obtain an expert on the effects of drug use on the credibility of a witness or to make a proper investigation into the state's

witnesses' backgrounds. During cross-examination, the defense solicited from the state's three eyewitnesses significant facts concerning both their long term drug usage and their use of drugs and alcohol during the night of the murder. Indeed, the trial record reveals that the defense significantly impeached the state's three eyewitnesses. After cross-examination none of the state's eyewitnesses looked like either model citizens or clear eyed, sober witnesses. In view of defense counsel's success in attacking the credibility of these witnesses the Court is unsure what benefit an expert would have added to that attack. In short, the Court can not conclude that defense counsel was ineffective because of his failure to retain an expert on drug usage. Even if defense counsel was ineffective, the Court can see no prejudice inuring to the petitioner because of the deficiency. As to defense counsel's failure to investigate the witnesses' background, the petitioner has made no showing that defense counsel failed to properly investigate nor that the petitioner was prejudiced because of an inadequte investigation. Unsupported

allegations do not give rise to grounds for habeas relief. Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1983).

(D) The petitioner's fourth claim of ineffective assistance relates to defense counsel's failure to request an independent psychiatric examination of the petitioner and to defense counsel's failure to obtain character witnesses for the petitioner. Prior to trial the trial judge refused to pay for a private psychiatrist to examine the petitioner in his search for mitigating factors. The trial court did offer to provide the petitioner with the services of a court appointed psychologist. However, the petitioner refused the services of the court appointed psychologist.

As the court appointed psychologist found codefendant Miller to have acted under the influence of the petitioner, the Court can see why the petitioner did not want to be examined by that particular psychologist. However, once again the petitioner does not specifically state how a privately retained psychologist would have aided him. The petitioner had the opportunity to present evidence on point

but declined to call a psychiatric witness in support of this claim at his Rule 3.850 hearing. As with the petitioner's third claim of ineffective assistance of counsel, speculative prejudice can not sustain a finding of constitutionally deficient counsel. See Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1983).

The petitioner also claims that his trial counsel did not obtain character witnesses in mitigation of his sentence. However, the Court notes that trial counsel did discuss with the petitioner the use of mitigation witnesses. Therefore, at a minimum trial counsel was aware of the possibility of their use. While the Court will not speculate on the reason that no character witnesses were presented during the sentencing phase of the petitioner's trial, the Court notes that the petitioner did not present any such character witnesses at his Rule 3.850 hearing. As the burden is on the petitioner to show both counsel's ineffectiveness and resulting prejudice, the Court concludes that with regard to the character witness claim, the petitioner

has failed to establish either of his burdens.

(E) Petitioner's fifth claim of ineffective assistance of counsel relates to trial counsel's failure to object on two occasions to the court's allegedly erroneous instructions to the jury. The allegedly erroneous instructions concerned the failure to define sexual battery as the underlying felony in the felony murder charge and the sentencing instruction on mitigating factors which allegedly limited the jury's consideration to only statutory mitigating factors. The Court has previously considered the substance of the petitioner's arguments relating to the unconstitutionality of these instructions and found them to be meritless. As the Court found the instructions to be constitutionally sufficient there can be no Sixth Amendment violation because of trial counsel's failure to object to them.

(F) In the petitioner's sixth claim of ineffective assistance of counsel, he alleges that his initial attorney in the case, Jack Hoogewind, had a conflict of interest with the petitioner's representation because Mr. Hoogewind

simultaneously represented Ray Boone. At trial Boone testified against the petitioner. However, the record reflects that Mr. Hoogewind represented Mr. Boone in a case totally unrelated to the petitioner's case after the state listed Mr. Boone as a witness. Thus, the petitioner has not shown that "his counsel actively represented conflicting interests" as required under Cutler v. Sullivan, 446 U.S. 335 (1980). Accordingly, this claim is without merit.[10]

(G) In his first amendment to his petition the petitioner alleges another claim of ineffective assistance of counsel - that trial counsel's cross-examination of the state's witnesses was constitutionally infirm. Supporting this claim is the affidavit of Richard A. Givens, an experienced trial lawyer who has published treatises on trial advocacy. However, in contrast to Mr. Givens after-

10/ The original petition presents this claim both as an instance of ineffective assistance of counsel and as a separate due process claim. See original petition at 5 and 48. However, although the Court treats this allegation as an ineffective assistance claim, the allegation would also be denied if considered as a separate due process claim.

the-fact conclusions regarding the petitioner's trial counsel's cross-examination, the state trial judge who presided during the entire trial and post trial proceedings found that "text book cross-examination" had been conducted by petitioner's trial counsel. This Court's independent review of the record leads to the conclusion that the state judge's conclusion is correct and much more than "fairly supported by the record". See 28 U.S.C. 2254(d)(8). Accordingly, the petitioner's claim is without merit.

VIII

In the petitioner's eighth claim for relief, also asserted in his first amended petition, the petitioner alleges that his constitutional right to a fair trial was violated because the trial judge was biased in his consideration of the petitioner's claims of ineffective assistance of counsel. As proof of the trial judge's bias the petitioner recites the trial judge's adverse rulings against the petitioner. The petitioner presented this argument to the Florida Supreme Court where it was denied. In order to rise to a constitutional violation, the alleged

bias and prejudice of a judge must stem from an extrajudicial source and result in an opinion on the merits resting on a basis other than what the judge learned from his participation in the case. United States v. Grinnell Corp., 384 U.S. 563 (1966). The petitioner does not cite any extrajudicial basis for the trial court's alleged prejudice. The Court upon its independent review of the record can point to no instance where the trial court even inferentially displayed bias toward the petitioner. As such, the petitioner's claim is without merit.

In conclusion, for the reasons stated in this Memorandum of Decision, the Court DENIES the instant petition in its entirety except for the petitioner's allegations of prosecutorial misconduct regarding the Marvin - Carroll recantations.

DONE AND ORDERED in Chambers at Tampa, Florida, this 30th day of April, 1984.

George C. Carr /s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EARNEST LEE MILLER,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondents.

MEMORANDUM OF DECISION

This cause comes before the Court pursuant to petitioner's 28 U.S.C. §2254 petition. The petitioner has been sentenced to death and was scheduled for execution on July 19, 1983. The original habeas petition was filed on July 14, 1983 and, by necessity, this Court stayed the scheduled execution in order that the petitioner's claims might be fully considered. All claims are now exhausted and the parties have completely briefed their respective positions.

FACTS SURROUNDING THE OFFENSE

On July 13, 1979, the badly burned body of a still unidentified young woman was found in a Pasco County game preserve. Six weeks later an indictment was issued by the grand jury charging the petitioner and his stepbrother, William Jent, with premeditated murder. The petitioner and his stepbrother were convicted of first degree murder in separate trials.

The main evidence against the petitioner came from two eye witnesses to the crime - Carlena Jo Hubbard and Glenna Frye. These witnesses testified that they were part of a group of eight people who had gathered for a party near a swimming hole on the Withlacoochee River in Pasco County. All those attending the party had been drinking to various degrees and there was some use of drugs. During the party the victim - tentatively identified during the trial as "Tammy" - arrived at the

scene by some unknown means. Tammy began fighting with one of the group - Samantha Carver. Co-defendant Jent pulled Carver off of Tammy and began to beat Tammy with his fists. The petitioner joined in the beating which became increasingly vicious. Using a stick, the petitioner then beat the victim into unconsciousness.

The petitioner and Jent placed the victim in the trunk of the petitioner's car and returned to the petitioner's house. Tammy was taken out of the trunk and raped on the back of the trunk by the four men in the group, including the petitioner and Jent. The two testifying eyewitnesses watched the rape.

After the rape the victim was placed back in the trunk of the car and the entire group except for one member drove to the game preserve. The petitioner and Jent took the victim out of the trunk and laid her on the ground. The petitioner

then poured gasoline on the victim and set her on fire.

PROCEDURAL HISTORY OF THE PETITION

Following a jury trial the petitioner was convicted of first degree murder on November 15, 1979. On advice of his trial counsel, the petitioner did not testify at either the guilt or sentencing phase of his trial. Disregarding the jury's seven to five vote which recommended life imprisonment, the trial judge sentenced the petitioner to death on January 30, 1980.

The petitioner appealed to the Florida Supreme Court which affirmed both the conviction and sentence and subseqently denied the petitioner's request for a rehearing. See Miller v. State, 415 So.2d 1262, (Fla. 1982), cert. denied, 103 S.Ct. 802 (1983).

In March, 1983 the petitioner filed a Motion to Vacate, Set Aside or Correct

Conviction and Sentence pursuant to Fla.R-.Crim.P. 3.850 in the Circuit Court of the Sixth Judicial Circuit for Pasco County, Florida. On June 24, 1983, the trial court denied the petitioner's motion in part but ordered a joint hearing on the petitioner's and his co-defendant's claims of ineffective assistance of counsel. After a July 12th hearing on this issue, the trial court denied the petitioner's Rule 3.850 motion in total. The Supreme Court of Florida on July 18, 1983 affirmed the lower court's denial of the petitioner's Rule 3.850 motion. The Governor of the State of Florida had signed a warrant for the execution of the petitioner on July 19, 1983. Therefore, in order that this Court be given time to review the instant petition, the Court stayed the execution on July 18, 1983 - the day the petition was filed. The petitioner presents six grounds for relief in

his petition. There is no dispute that the petitioner has exhausted all of his state remedies for his claims. Thus, this court will address those claims in sequence.

I.

The petitioner's first claim for relief is that during the sentencing phase of the trial, the trial Court excluded mitigating testimony concerning the petitioner's rehabilitative capacity. The petitioner thus argues that mitigation testimony was unconstitutionally restricted. Citing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The basis of the petitioner's claim is the trial court's comments prior to the testimony of Dr. Sidney J. Merin, a court appointed psychologist who examined the petitioner. These comments arguably restricted Dr. Merin's

testimony concerning the petitioner's rehabilitative capacity. The petitioner presented this claim to the Florida Supreme Court who found no error due to the purported restriction because the psychologist's testimony was effective in obtaining a jury recommendation of life imprisonment. See Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982).

The legal framework surrounding petitioner's claim was summarized in Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Court stated: "[T]he Eighth and Fourteenth Amendments require that the sentencer, . . . not be precluded from considering, as a mitigating factor any aspect of a defendant's character or record and any of the circumstances that the defendant proffers as a basis for a sentence less than death."

The remarks of the trial court which the petitioner alleges unconstitutionally

restricted the sentencer's consideration of mitigating testimony occurred prior to Dr. Merin's testimony when the trial judge engaged in a colloquy with counsel. That colloquy went as follows:

> MR. HERSCH (petitioner's attorney): His (Dr. Merin's) testimony will specifically go, I believe, and again I'm not acquiescing that he's not allowed to testify, nor am I saying the circumstances are enumerated and I can't go beyond them, but his testimony will fit within one of the mitigating circumstances. . .
>
> THE COURT: He's not gonna testify to rehabilitative capacity of Mr. Miller?
>
> MR. COPE (prosecuting attorney): We haven't had an opportunity to one, either review any written reports or two, have talked to the doctor with reference whatever he would testify to.
>
> THE COURT: Okay. Well, I'll -- we'll consider those objections when they come up.
>
> MR. COPE: Yes, sir.
>
> MR. HERSCH: I believe he would, in fact, testify to rehabilitative capacity. I believe it may fall within Subsection F (of the Florida statutory mitigating factors). I am indicating to the Court that specifically some of his testimony will fall under Subsection F of mitigation, Subsection E of

duress or substantial domination of another person and I think that incumbent in those two, E and F, he's going to analyze the defendant's character, I would imagine pursuant to the testing he gave.

THE COURT: Okay. Mr. Hersch, I'm gonna find that F in the statute does not encompass rehabilitative capacity of the defendant.

MR. HERSCH: Yes, sir.

THE COURT: I'm not -- we can -- that will have to do. I'm not suppressing any of his testimony because I don't know what it will be. Okay?. . .

Trial Record (hereinafter TR) at 1545-56.

RECESS

THE COURT: Anything before we call the jury back in, gentlemen?

MR. COPE: If defense is gonna put on Doctor Merin I'm gonna ask for a proffer.

THE COURT: Why is that?

MR. COPE: I've never read or received a written report. I've never, but for about two, three, maybe four minutes in the Court chambers today had the opportunity to talk to him and that conversation had to be interrupted. I don't have a complete review or any conversation of what he's gonna say.

THE COURT: I'll deny the request, Mr. Cope. We're gonna go ahead with him. The rules of Court will stand,

however, that he's not to discuss rehabilitative capacity.

MR. COPE: Is the Court gonna instruct the witness to that?

THE COURT: Mr. Hersch, I assume, will do that. If he does, you can object.

MR. COPE: I've observed Doctor Merin testify numerous times. When he starts speaking, he goes.

THE COURT: You can stand up and object. Court maybe can stop him.

TR at 1567-68.

Whatever the interpretation given by the parties to this colloquy, the record evidences that Dr. Merin gave unfettered and detailed testimony concerning the petitioner's chameleon like personality - i.e., that the petitioner would take on the characteristics of those people that he was immediately associated with. Specifically, Dr. Merin testified: "[I]f he (the petitioner) surrounds himself with a group of ministers or clergymen or chaplains or professors and so on, he would take on the charactertistics of that

particular group." TR. at 1591. Dr. Merin then elaborated at great length on this aspect of the petitioner's personality. During the course of Dr. Merin's testimony the state made one non-related objection to the relevancy of that testimony. The trial court overruled the objection. Thus, during both direct and redirect examination, the petitioner conducted a basically unrestricted examination of Dr. Merin.

The sole support for the petitioner's allegations of trial court restrictions on mitigating testimony comes from those portions of the trial court's colloquy where the judge stated that "he's (Dr. Merin) not to discuss rehabilitative capacity." However, the trial court also stated that he would preserve a ruling on any objections that the prosecutor had until presentation of the actual testimony.

Despite the alleged restriction, Dr. Merin testified extensively and favorably from the petitioner's perspective. From a review of the trial transcript it appears that while the trial judge may have made a statement that testimony relating to rehabilitative capacity would be restricted, it is obvious that Dr. Merin did testify about the petitioner's rehabilitative capacity.

The Court reaches this conclusion in part through an analysis of the totality of Dr. Merin's testimony. Specifically, after reading the trial transcript the Court is struck by the question of what additional favorable testimony could have been presented by Dr. Merin regarding the petitioner's psychological make-up or rehabilitative capacity. It does not take a quantum leap of logic to recognize that Dr. Merin thought that the petitioner had a good chance for rehabilitation if placed

in a benign environment. Dr. Merin implicitly stated that proposition. The trial court, the ultimate sentencer in this case heard Dr. Merin's testimony and gave it due consideration. Although restricted in theory, in reality there was no restriction on the mitigating evidence in the form of Dr. Merin's testimony on rehabilitative capacity.[1] Accordingly, there was no Lockett or Eddings violation and this claim will be dismissed.

II.

The petitioner's second claim for

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[1] Apart from all the legal argument that the petitioner asserts in support of this claim, the petitioner offers no statement from Dr. Merin indicating how his testimony concerning the petitioner's rehabilitative capacity would differ from his testimony already presented. The petitioner does not even speculate as to the nature of Dr. Merin's possibly favorable testimony on rehabilitative capacity. The Court thus finds the conclusion inescapable that Dr. Merin would have nothing else to say other than an elaboration on his previously spoken conclusions.

relief is based on the fact that the jury recommendation of life imprisonment was overturned by the sentencing judge who sentenced the petitioner to death. The petitioner's co-defendant had received a jury recommendation of death. At the combined sentencing hearing, the sentencing judge upon review of all sentencing factors and after citing a need for consistency in sentencing, sentenced the petitioner to death. Pointing to the sentencing judge's remarks concerning consistency, the petitioner alleges that his right to an individualized consideration of sentencing factors was violated. Citing Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983); Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983).

A review of the sentencing order reveals that the petitioner is woofully mischaracterizing the basis for the sen-

tencing judge's decision when he states that the sentencing was based solely upon a need for consistency. The sentencing judge noted the burden associated with a judicial overturn of a jury recommendation of life. Citing Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person should differ). Because of the jury's recommendation the sentencing court recognized that it was required to give "greater weight" to the mitigating circumstances found applicable. See Beckren v. State, 355 So.2d 111 (Fla. 1978).

The sentencing judge found that two statutory aggravating circumstances were present in the petitioner's case. The first was that the murder was especially

heinous, atrocious and cruel. See Fla. Stat. §921.141(5)(h). The second was that the crime was committed by Miller in a cold, calculated and premediated manner without any pretense of moral or legal justification. See Fla. Stat. §921.131(5)(i).[2]

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[2] There is some confusion as to the number of statutory aggravating circumstances found by the sentencing judge. In his oral findings entered at the sentencing hearing, the judge after discussing the particularly brutal nature of the crime stated that he found the aggravating circumstances listed in Fla. Stat. §§921.141-(5)(h) and (5)(i) to overlap. Consequently, the court stated that it "is only going to consider those last two [aggravating circumstances] as one aggravating circumstance. TR. at 550.

However, in his written sentencing order after noting the comparability of section (5)(H) and (5)(i), the court nevertheless found both aggravating circumstances to exist. Thus, notwithstanding the court's pronouncements at the hearing, its formal order takes precedence. See Osaka Stosen Kaisha, LTD v. Angelos, Leibek & Co. LTD., 301 F.2d 59 (4th Cir. 1962) (written findings supercede arguably inconsistent oral findings). Accordingly, based on the court's written sentencing order the Court finds that two aggravating circumstances were present in the petitioner's

Counterbalancing these two aggravating factors, the sentencing judge found one statutory mitigating factor - that Miller did not have any significant history of prior criminal activity. See Fla. Stat. §921.141(6)(a). The sentencing judge also noted Dr. Merin's testimony that the petitioner was a social follower. However, the sentencing judge did not find that fact to be mitigating because there was no evidence that the petitioner acted under the domination of his co-defendant.

The sentencing judge carefully weighed the aggravating and mitigating factors and determined that due to the heinous nature of the crime and the petitioner's participation in it, a death sentence was warranted. The petitioner and his co-defendant were found to have been equally culpable and to have attemp-

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sentencing.

ted "to outatrocity the other in killing this girl." Written Sentencing Findings at 4. Because the two co-defendants were jointly sentenced, the sentencing order tends to interchangeably discuss the petitioner's and co-defendant Jent's sentencing considerations. However, this joint discussion and the judge's remarks concerning the injustice of a disparate sentence for two equally participating defendants does not mean that the petitioner did not receive an individualized sentencing consideration. The written sentencing findings reveal that the judge individually considered the petitioner's sentence and found that his participation in the crime merited death. In sum, a neutral review of the record and the sentencing order leads to the conclusion that there was no constitutional violation. Accordingly, this claim will be dismissed.[3]

III.

In the petitioner's third claim for relief he alleges that the sentencing judge impermissibly considered nonrecord evidence. Specifically, the petitioner alleges that the trial court based its finding that the crime was committed in a cold, calculated and premeditated manner on evidence presented at co-defendant Jent's trial that the victim tried to get up before being immolated. No such evidence was presented at the petitioner's trial. The petitioner argues that this alleged consideration of nonrecord

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3 The petitioner also argues that the judicial override of the jury's recommendation of life is by itself unconstitutional when one or more mitigating circumstances are found. However, the Supreme Court in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983), implicitly upheld the constitutionality of Florida's judicial override. The Supreme court is at this time specifically considering the question in Spaziano v. Florida, Case No. 83-5596, cert. granted, 52 U.S.L.W. 3540 (1984). The Spaziano decision should be released sometime during the summer of 1984. In the interim, Barclay controls.

evidence violated his constitutional right to due process. Citing Gardner v. Florida, 430 U.S. 349 (1977).

A review of the sentencing order reveals that the judge arrived at his conclusion that the petitioner committed the crime in a cold and calculating manner without considering that testimony which was only produced in the Jent trial. The court stated:

> Counsel for the defendant argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried to sit up after gasoline was poured on her, but before she was ignited, this Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

Written Sentencing Findings at 2-3.

A review of the record in the peti-

tioner's case reveals that the sentencing judge had ample evidence upon which he could base his finding that statutory aggravating circumstances existed apart from the evidence exclusively presented in the Jent case. The sentencing order explicitly notes that a finding of statutory aggravating circumstances existed without the evidence relating to the victim's attempt to get up. The written sentencing order is not a disclaimer of the court's oral order as characterized by the petitioner. The written order is an elaboration on the sentencing judge's conclusion expressed in the oral order that whether the victim was conscious or unconscious at the time of the burning, the petitioner acted in a cold and calculated manner.

It is presumed that when a judge acts as a finder of fact he will ignore inadmissible evidence when making decisions. Harris v. Rivera, 454 U.S. 339 (1981).[4]

Thus, even without the written sentencing order the presumption is that the sentencing court acted in a constitutional manner. The petitioner has produced no evidence to rebut that presumption and indeed the evidence clearly points to the contrary. Accordingly, there is no Gardner violation and this claim will be dismissed.

IV.

The petitioner's fourth claim is that he was unconstitutionally denied access to the grand jury testimony of the state's two eyewitnesses to the crime - Glenna Frye and Carlena Hubbard. The petitioner

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[4] The Court has previously noted in this Memorandum of Decision that written findings take precedence over oral findings. See note 2 supra. Thus, the basis for the determination of whether constitutional error was committed in sentencing is the written sentencing findings. Those findings clearly show that the Jent evidence was not considered in the petitioner's sentencing.

avers that as his trial strategy was based on attacking the credibility of the state's witnesses, the possibly exculpatory evidence contained in the grand jury transcripts should have been made available. Citing Davis v. Alaska, 415 U.S. 308 (1974). The Florida Supreme Court affirmed the decision of the trial court to neither release nor review the transcripts based on the Supreme Court's reasoning in the appeal by petitioner's co-defendant. See Miller v. State, 415 So.2d 1263, n.3, citing Jent v. State, 408 So.2d 1024 (Fla. 1981) cert. denied, 102 S.Ct. 2916 (1982).

In reviewing co-defendant Jent's section 2254 petition, this Court has also considered the identical claim of constitutional deprivation because of the trial court's refusal to release the grand jury transcripts of Ms. Frye and Ms. Hubbard.[5] See Jent v. Wainwright, Case

No. 83-860-Civ-T-13. (Memorandum of Decision dated April 30, 1984). The petitioner does not assert any different facts or legal theories from his co-defendant. Accordingly, for the reasons stated in the Court's Memorandum of Decision in Jent v. Wainwright, this claim of petitioner will be dismissed.

V.

The petitioner's fifth claim for relief is that he received unconstitutionally inadequate representation of

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5 At the petitioner's trial the only eyewitnesses the state called were Ms. Frye and Ms. Hubbard. Another eyewitness to the crime, Patricia Tirikaine, testified at the trial of co-defendant Jent but did not testify at the petitioner's trial. However, all three witneses were named in the state's witness list in the petitioner's trial. Other than the fact that Ms. Tirikaine was not called to testify, there is no substantive difference in either the facts or the underlying legal theory regarding the petitioner's claim for relief based on the denial of his request for the grand jury transcripts and the identical claim of co-defendant Jent.

counsel at trial. In the amendment to his habeas petition the petitioner presents four specific claims of deficiency on the part of his appointed trial counsel.[6] These claims are:

A. Failure to obtain a defense forensic expert on the cause of death;

B. Failure to renew motion for appointment of investigator;

C. Ineffective implementation of chosen trial strategy;

D. Failure to investigate alternative lines of defense.

The state court conducted a joint

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[6] The petitioner filed his original petition and an amendment to the petition on July 14, 1983. On that date the Florida Supreme Court was still considering some of the petitioner's Rule 3.850 Fla.R. Crim.P. claims. Thus, those claims were unexhausted. Anticipating the denial of those claims by the Florida Supreme Court, the petitioner filed the amendment to the petition prior to the Supreme Court's decision on July 18, 1983. The petitioner's claims contained in his amendment to the petition are consequently ripe for this Court's review.

hearing on all of the petitioner's and his co-defendant's ineffective assistance of counsel claims.[7] The state court denied those claims in a written order entered on July 13, 1983. The Florida Supreme Court affirmed that Order.[8]

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[7] The state court order denying the petitioner's ineffective assistance of counsel claims lists three specific claims that were presented. The instant petition contains four ineffective assistance claims and thus it would appear that one federal claim was not exhausted. However, the instant claims are merely more detailed versions of those claims presented in the Rule 3.850 motion. Thus, the Court finds that the claims have been exhausted and are properly submitted to this Court.

[8] The petitioner has moved to hold an evidentiary hearing on all of his claims, including his claims of ineffective assistance of counsel. However, before a federal court must afford an evidentiary hearing on an exhausted state habeas claim the petitioner must allege that a "material" fact was not developed at the state court hearing and that the failure to develop the fact was not attributable to the petitioner's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

In the instant case, before ruling on his Rule 3.850 motion, the state court afforded the petitioner a comprehensive hearing on his ineffective assistance of

counsel claim. The hearing included the petitioner's presentation of expert testimony. The trial judge made detailed findings on the competency of the petitioner's counsel which this Court may adopt without affording the petitioner any further opportunity to produce evidence. See Ford v. Strickland, 696 F.2d 809, 825 n.1 (11th Cir. 1983) (Tjoflat, J., concurring).

The petitioner, however, alleges that evidence necessary to develop his claim of ineffective assistance concerning trial counsel's alleged failure to obtain a defense forensic expert on the cause of death was inadvertently unavailable at the Rule 3.850 hearing. Specifically, the petitioner claims that only inadequate black and white photographs of the victim's corpse were available to Dr. Wright - the petitioner's expert medical examiner. Petitioner's counsel has supplied an affidavit explaining the reason for the lack of color photos. Significantly, however, the petitioner does not state how color photographs would have aided Dr. Wright's testimony. In light of the beneficial nature of Dr. Wright's testimony, the Court cannot conceive how color photos would have added to that testimony. Upon the discovery of the alleged inadequacy the petitioner made no protest nor made no motion for a continuance. Appeals Record (hereafter AR) at 944. A review of Dr. Wright's testimony reveals that while learned, it noted the possibility of different opinions both as to cause of death and whether the victim was alive when burned. In any event due to the nature of the Court's resolution of this claim, there is no need to rehear Dr. Wright's

carries with it a corollary that guarantees the right to effective counsel. Washington v. Strickland, 683 F.2d 1243 (5th Cir. Unit B, 1982). A habeas petitioner asserting a claim of ineffective assistance of counsel must prove by a preponderance of the evidence that (1) his counsel was in fact ineffective and (2) that his counsel's ineffectiveness caused "actual and substantial prejudice to his case." Washington supra at 1250; Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Constitutionally effective counsel is not errorless counsel, nor counsel judged ineffective by hindsight but counsel which was reasonably effective as judged by the totality of circumstances

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testimony. See test infra at 19-22.

The petitioner does not allege any other material omissions of fact. Therefore, as the Court has adopted the state judge's findings of fact, no federal evidentiary hearing is required on the ineffective assistance claim. Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983).

in the entire record. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981).

Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings. In his supplemental memorandum in support of his motion the petitioner implicitly argues that exceptions (2), (3) and (6) to section 2254(d) are applicable in his case.[9]

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[9] Section 2254(d) provides:

In any proceeding instituted in a federal court by an application for a writ

However, the petitioner offers only one instance where an allegedly material fact was not considered by the state court. Specifically, the petitioner avers that the inadequacy of the black and white photographs of the victim's corpse prevented a complete evaluation of the cause of death by his expert medical examiner, Dr. Ronald Wright. Petitioner's counsel had three months notice of the hearing on petitioner's Rule 3.850 motion but only

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of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the State ... were parties, evidenced by a written finding, or written opinion, ... shall be presumed to be correct, unless the applicant shall establish ... -

(2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the state court hearing;

(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding.

discovered on the day of the hearing that petitioner's trial counsel possessed only allegedly inadequate black and white photographs of the corpse. The original color photographs were in the possession of the Florida Supreme Court. However, as discussed in note 8 supra the Court does not find the absence of color photographs to have resulted in an excused material deficiency in the state court hearing.

Reading the record of the state court's Rule 3.850 hearing as a whole, it is obvious that the hearing was comprehensive and unfettered. The petitioner was given complete discretion to establish his claim of ineffective assistance at the state court hearing. The petitioner presented the live testimony of his trial counsel, Larry Hersch, an expert trial attorney, Paul Kanarek, and Dr. Wright. The record indicates that there was virtually no restrictions on the deve-

lopment of the petitioner's claim. As the petitioner received an adequate hearing, the state court's findings are presumptively correct.

In order to overcome that presumption, the petitioner must establish that the state court's findings are "not fairly supported by the record." 28 U.S.C. §2254(d)(8). Under §2254(d), however, state court findings are entitled to a high measure of deference and "[t]his deference requires that a federal habeas court must more than simply disagree with the state court before rejecting its factual determinations." Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983).

Petitioner's first claim of ineffec-

tive assistance of counsel is that trial counsel failed to move for a defense forensic expert on the cause of death. The petitioner supports this claim with the testimony of Dr. Wright, an experienced medical examiner. Dr. Wright testified at the state court ineffective assistance hearing that the victim was probably not alive when immolated and that the cause of death could have been strangulation. Dr. Wright's testimony would arguably have contradicted the testimony of the state's medical examiner - Dr. Nowab. Dr. Nowab testified that the victim was probably alive when burned and that burning was the cause of death.

Notwithstanding Dr. Wright's speculations, at the state court hearing the petitioner's trial counsel testified that he believed the equivocal nature of Dr. Nowab's report was beneficial to the defense. Thus, petitioner's trial counsel

made a tactical decision to forego another possibly more prejudicial opinion. In addition, as noted by the state court judge, the medical examiner testified at the petitioner's trial that the victim was unconscious and beyond sensitivity to pain when immolated. Arguably, this fact lessened the heinous nature of the crime. The petitioner's attorney thought that another opinion could have decreased the value of this arbuably beneficial testimony. In reviewing a claim of ineffective assistance of counsel, this Court will not second guess a legitimate tactical decision at trial. Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). Accordingly, this claim is without merit.

In a broad case, the petitioner's second, third and fourth claim of ineffective assistance of counsel stems from his trial attorney's alleged failure to ade-

quately investigate the case. More specifically, the petitioner's second claim of ineffective assistance is that his trial counsel was incompetent for not renewing his motion for the appointment of an investigator. The petitioner's third claim is that his trial counsel ineffectively implemented his chosen trial strategy by not conducting adequate cross examination of the state's witnesses. The fourth claim alleges trial counsel's failure to investigate alternative lines of defense.

The evidence produced by the petitioner in support of his allegations of counsel's inadequate investigation consists solely of the testimony of Paul Kanarek, a trial attorney experienced in capital cases, Mr. Kanarek obtained most, but not all, of the petitioner's trial attorney's files the night before the hearing on petitioner's motion. Mr.

Hersch's files were disorganized due to his preparation of the direct appeal of petitioner's case, never talked to Mr. Hersch and admittedly did not read all of Mr. Hersch's notes nor listen to tape recordings of witness depositions.

The petitioner briefly put his trial counsel on the stand. AR 1030-1043. The bulk of Mr. Hersch's testimony relates to his perceptions and actions concerning the medical examiner's findings. As discussed previously, Mr. Hersch effectively explained his strategy concerning the medical examiner. Perhaps because Mr. Hersch's before the fact perceptions would refute Mr. Kanerek's after the fact condemnation of Mr. Hersch's actions, the petitioner did not ask Mr. Hersch any questions concerning the extent, effort or theoretical approach to his pre-trial investigations. Thus, the only evidence before this Court supporting the

petitioner's allegations of inadequate investigation is the testimony of one lawyer. That testimony is based on an extremely hurried, perhaps more accurately stated, frantic review of the incomplete record of the trial attorney. Without either talking to the trial attorney or reviewing the court file, Mr. Kanarek arrived at a conclusion that the trial attorney conducted the case in an incompetent manner.

Opposing Mr. Kanarek's testimony is the findings of the trial judge. Although there was some dispute at the hearing over whether Mr. Kanarek had sufficient expertise to judge the competency of Mr. Hersch, there is no doubt that the trial judge is capable of making that determination. In contrast to Mr. Karanek, the trial judge viewed Mr. Hersch's preparation and performance during the pre-trial, trial, and sentencing

proceeding and post trial. In ruling on the petitioner's motion with relation to the instant claims, the state court found:

> 2. Defendent [sic] failed to show that trial counsel were ineffective in pursuing their motions for funds to hire an investigator or to conduct effective cross examination themselves. In fact, the pre-trial depositions and the trial transcript show conclusively that both trial counsel were well prepared and far above average in their cross-examination of all of the eyewitnesses.
>
> 3. Defendant failed to show that the failure of trial counsel to present evidence to rebut the testimony about "jail house" confessions was anything but good tactical decisions.

Trial court's Order of July 18, 1983 at 4, AR at 1167.

It goes almost without saying that the trial judge was better able than Mr. Kanarek to render an opinion on the competency of Mr. Hersch. Thus, in the absence of convincing evidence to the contrary, this Court must defer to the state court's findings. See Rushen supra. Accordingly, without specifically addressing each facet

of petitioner's ineffective assistance claims, they will be DISMISSED.

VI.

The petitioner's sixth claim for habeas relief based on allegations of prosecutorial misconduct is virtually identical to co-defendant Jent's sixth claim of relief.[10] The Court has considered and dismissed with one exception the allegations of prosecutorial misconduct contained in the Jent petition. See Jent Memorandum of Decision at 20-26. For the reasons stated in the Court's Memorandum of Decision in the Jent petition, all of petitioner's allegations of prosecutorial misconduct with the one exception

[10] Co-defendant Jent's claim of prosecutorial misconduct contains allegations of coerced inculpatory testimony by Jent's cellmate - James Ray Boone. The petitioner's claim does not contain such an allegation. However, with the exception of the inclusion of the Boone allegation, Jent's petition is identical to the petitioner's.

discussed below will be dismissed.

As noted by the petitioner, the most egregious of the allegations of prosecutorial misconduct are that the State threatened witnesses Tina Parsons and Elmer Carroll into recanting their exculpatory testimony. After considering this claim in the Jent petition, this Court concluded that an evidentiary hearing was necessary in order to allow the petitioner an opportunity to substantiate his claim. Accordingly, for the reasons stated in the Court's Memorandum of Decision in the Jent petition, an evidentiary hearing will be conducted at the same time and under the same requirements as outlined in the Jent Memorandum of Decision. See Jent Memorandum of Decision at 24-26.

In conclusion, with the exception of the one claim of prosecutorial misconduct outlined above, the instant petition will be DISMISSED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 30th day of April, 1984.

George C. Carr /s/
UNITED STATES DISTRICT JUDGE

MILLER v. WAINWRIGHT

Earnest Lee MILLER,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; Richard Dugger, Superintendent Florida State Prison, Starke, Florida; and Jim Smith, Attorney General of the State of Florida, Respondents-Appellees.

William Riley JENT,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation; Charles G. Strickland, Jr., Superintendent of Florida State Prison, Starke, Florida; and Jim Smith, Attorney General of the State of Florida, Respondents-Appellees.

Nos. 85-3175, 85-3185.

United States Court of Appeals,
Eleventh Circuit

Aug. 14, 1986.

Petitioners sought habeas corpus, challenging state convictions and death sentences for first-degree murder. The

District Court, Tampa, 83-849-Civ-T-13, George C. Carr, J., denied the petitions, and petitioners appealed. The Court of Appeals held that: (1) ineffective assistance of counsel claims had to be reexamined by district court under correct Strickland standard, where federal district court had improperly accorded presumption of correctness to state court's mixed law-fact determination of absence of ineffective assistance; (2) it was incumbent upon some court to review grand jury testimony of eyewitnesses to determine whether petitioners had particularized need sufficient to overcome need for secrecy of grand jury proceedings, where witnesses had testified to two different versions, both under oath; and (3) on claim of improper exclusion of mitigating testimony concerning petitioner's rehabilitative capacity during sentencing proceeding, federal district court had to determine whether state trial judge, in setting death sentence, freely considered rehabilitation to be mitigating factor, not merely whether trial court heard such testimony.

Vacated and remanded.

1. Habeas Corpus §92(1)

Habeas Corpus petitioners' ineffective assistance of counsel claims had to be reexamined by district court under correct Strickland standard, where federal district court had improperly accorded presumption of correctness to state court mixed law-fact determination of absence of ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

2. Grand Jury §41.50(5)

To obtain grand jury testimony, defendant must show particularized need sufficient to justify revelation of generally secret grand jury proceedings.

3. Grand Jury §41.50(5)

Threshold showing needed for in camera review of grand jury proceedings by court to determine their relevance and usefulness to defendant is not as high as that needed for defendant to obtain the evidence.

4. Grand Jury §41.50(10)

Federal district court improperly applied requirement that defendant show particularized need to justify revelation of generally secret grand jury proceeding to habeas corpus petitioners' request that court conduct in camera review of grand jury testimony to determine relevance and usefulness to petitioners, by holding that particularized-need standard had not been met because witnesses had been thoroughly cross-examined with deposition testimony contrary to their trial testimony.

5. Grand Jury §41.50(10)

Defendant need not establish what is in grand jury testimony, to avoid rule that such testimony will not be revealed on pure speculation, where it appears clear that the testimony, under oath, is bound to differ from other testimony given under oath.

6. Grand Jury §41.50(10)

It was incumbent upon some court to review grand jury testimony of testifying eyewitnesses to determine whether defendant had particularized need sufficient to overcome need for secrecy of grand jury proceedings, where witnesses' deposition testimony contradicted their trial testimony, making it apparent that grand jury testimony could not agree with both versions testified to by witnesses under oath.

7. Habeas Corpus §92(1)

In considering habeas corpus petitioner's claim of improper sentencing due to exclusion of mitigating testimony concerning petitioner's rehabilitative capacity during sentencing proceeding which led to imposition of death sentence, federal district court had to determine whether state trial judge, in setting death sentence, really considered rehabilitation to be mitigating factor, not merely whether state court heard testimony of rehabilitation.

Appeals from the United States District Court of the Middle District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Petitioners William Riley Jent and Earnest Lee Miller appeal from the district court's denial of their habeas corpus petitions challenging their state convictions and death sentences for first degree murder. These cases are complicated because of the existence of continuing collateral activities and proceedings in both the state courts, and the federal district court in which these petitions were heard. To consider and finally rule upon all issues raised on these appeals would apparently not finally resolve the question of whether petitioners' death sentences are constitutionally faulty, but would amount to nothing more than the kind of piecemeal litigation which the judicial system tries to avoid. As a matter of fact, a motion was filed with this Court asking that the Jent appeal be abated until either the appeal is mooted by the grant of relief by either the state or district court on other points not asserted on the appeal, or an appeal from a denial of those other claims can be

consolidated with this appeal. Since oral argument, the Court notes that some of the witnesses have allegedly recanted their testimony,[1] the prosecutor's investigation files have been opened by a court order,[2] and the state has now conceded the identity of the victim which was an issue at the time of their petitions.[3] Although none of this is inappropriate for this Court to recognize that there can be no finality in a decision based on what is officially before it.

These cases have been fully briefed and argued, however, and it is clear to us that the district court used the wrong legal standard in considering three different claims. As a matter of judicial efficiency, therefore, it seems appropriate for us to point these matters out to the district court, and remand these cases for reconsideration under the correct standards. All the other issues will then

1. St. Petersburg Times, August 1, 1986.

2. The Tribune Co., Mary Jo Melone, Times Publishing Co., and William Riley Jent v. In re: Public Records, ____ So.2d ____, 11 Fla.L.W. 1533 (Fla. 2d DCA, July 9, 1986).

3. St. Petersburg Times, August 1, 1986; The Tampa Tribune, August 1, 1986.

be back before the district court for reconsideration in the event that becomes appropriate in light of the new activity that is taking place in these cases. In doing this, we make no suggestion as to how this Court might rule on the other issues presented on these appeals. If the cases come back on appeal, either by the state or the petitioners, all issues presented to the federal forum can be considered at once with some hope of finality.

Since this opinion will be useful only to counsel and the district court, all of whom are thoroughly familiar with the facts and the prior legal proceedings in these cases, it is unnecessary here to recite any matters other than those upon which we are ruling.

[1] First, both Miller and Jent claimed ineffective assistance of counsel.[4] The

4. Miller claimed that he was denied effective assistance of counsel because his counsel (1) failed to obtain a forensic pathology expert to rebut the state expert's testimony that the victim was alive when burned; (2) failed to renew the motion for appointment of an investigator; (3) failed to take reasonable preparatory steps for the purpose of adducing impeachment evidence needed to implement his trial strategy of attacking the credibility of the state's witnesses; and

state trial court held evidentiary hearings on these issues. The Florida Supreme Court affirmed the trial court's denial of relief. **Jent v. State**, 435 So.2d 809, 810-13 (Fla. 1983) (attaching the trial court's order denying relief as an appendix to the opinion); **Miller v. State**, 435 So.2d 813, 814 (Fla. 1983).

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alternative lines of defense.

Jent claimed that his counsel (1) failed to obtain a forensic expert in pathology to rebut the State expert's testimony that the victim was alive when burned; (2) failed to obtain a forensic expert to rebut the State expert's testimony that it was "highly likely" that the hair found near the crime scene belonged to Jent; (3) failed to secure an expert on drug use who would cast doubt on the credibility of the State's witnesses who had mental or drug-related problems; (4) failed to request court apointment of a second psychiatrist and make any inquiry into mitigating circumstances; (5) failed to object to the court's failure to define sexual battery as the underlying felony in the felony murder charge and failed to object to the mitigating factors instruction which allegedly limited the jury's consideration to only statutory mitigating factors; (6) failed to investigate and adequately cross-examine the State's witnesses; and (7) conflict of interest by his first defense counsel.

The federal district court, in reviewing the ineffective assistance of counsel claims in separate opinions for Jent and Miller, accorded the state court's decision a presumption of correctness. In both cases the court stated:

> Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. § 2254(d); **Sumner v. Mata**, 449 U.S. 539 [101 S.Ct. 764, 66 L.Ed.2d 722] (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings.
>
> * * * * * * * *
>
> In order to overcome that presumption, the petitioner must establish that the state court's findings are 'not fairly supported by the record.' 28 U.S.C. § 254(d)(8). Under § 2254(d), however, state court findings are entitled to a high measure of

> deference and '[t]his deference requires that a federal habeas corpus must more than simply disagree with the state court before rejecting its factual determination.' **Marshall v. Lonberger**, [459 U.S. 422], 103 S.Ct. 843, 850 [74 L.Ed.2d 646] (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. **Rushen v. Spain**, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

Miller v. Wainwright --- Case No. 83-849-Civ-T-13, slip op. at 18 & 20 (M.D.Fla. April 30, 1984); **Jent v. Wainwright**, Case No. 83-860-Civ-T-13, slip op. at 29 & 31 (M.D.Fla. April 30, 1984).

This was an incorrect standard, and contrary to the now accepted standard set forth by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where it said:

> . . . in a federal habeas challenge to a state criminal judgment, a state court

conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of 'basic, primary, or historical fact[t],' **Townsend v. Sain**, 372 U.S. 293, 309, n.6 [83 S.Ct. 745, 755, n.6, 9 L.Ed.2d 770] (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See **Cuyler v. Sullivan**, 446 U.S. [335], at 342 [100 S.Ct. 1708 at 1714, 64 L.Ed.2d 333 (1980)]. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. Id. at 689, 104 S.Ct. at 2070.

Although the state argues that the district court granted the presumption only as to the historical facts found by the state court, everything in the record before us shows that the district court accorded the presumption to the mixed law-fact question of ineffectiveness, and not just to the finding of historical facts, which would be entitled to the presumption. The ineffective assistance of counsel claims must be reexamined by the district court under the correct Strickland standard.

Second, both Miller and Jent attempted to obtain the grand jury testimony of witnesses who testified against them at their separate trials. Miller's case involved the grand jury testimony of two eyewitnesses to the crime, Carlena Jo Hubbard and Glenna Frye. Jent's case involved Hubbard and Frye, and a third eyewitness, Patricia Tirikaine.

[2-4] To obtain grand jury testimony, a defendant must show a particularized need, sufficient to justify the revelation of generally secret grand jury proceedings. **See Dennis v. United States**, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973

(1966); **United States v. Proctor & Gamble** Co., 356 U.S. 677, 683, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). The district court held that the standard had not been met in this case because the witnesses were thoroughly cross-examined with prior deposition testimony contrary to their trial testimony. It is precisely because of this contradiction in the testimony that someone should look at the grand jury testimony to determine its usefulness to the defendants. **Dennis**, 384 U.S. at 872- 73, 86 S.Ct. at 1850-51. The petitioners are not now asking that their convictions or sentences be set aside on the basis of this claim, but merely assert that some court should at least conduct an **in camera** review of the testimony to determine its relevance and usefulness to the defendant. Sometimes an **in camera** inspection of material is necessary to determine if a party has shown sufficient particularized need. The threshold showing for an **in camera** review is not as high as that needed to obtain the evidence. The district court incorrectly applied the higher test in its response to this claim.

If the grand jury testimony is the same as that at trial, it would obviously be of no use to the defendant. If it is the same as the deposition testimony, contrary to that at trial, it might or might not be useful, since the deposition was used at trial. If it were a third version, unlike either the trial or deposition, it strikes us that it would probably be useful to a jury in trying to sort out what is true and what is not. As the Supreme Court stated in **Dennis**, 384 U.S. at 855, 86 S.Ct. at under these type of circumstances, "it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked."

[5, 6] The state argues that a defendant has to establish what is in the grand jury testimony to avoid the rule that such testimony will not be revealed on pure speculation. That sets too high a threshold, however, when it appears clear that the testimony, under oath, is bound to differ from other testimony, given under oath. **Dennis**, 384 U.S. at 872-74,

86 S.Ct. at 1850-51; **Proctor & Gamble**, 356 U.S. at 683, 78 S.Ct. at 986; **State of Wisconsin v. Schaffer**, 565 F.2d 961, 966 (7th Cir. 1977). Since the Court knows of two different versions under oath, it is quite apparent that the grand jury testimony cannot agree with both. This takes away the speculation as to the possible usefulness of the grand jury testimony. To ultimately decide the merits of the defendant's request, it is incumbent upon some court to review the grand jury testimony of the three testifying eyewitnesses to determine if the defendant has the particularized need sufficient to overcome the need for secrecy. Since neither the state or federal court has reviewed this evidence, the case must be remanded to the district court to consider the claim involving the grand jury testimony under the correct standard.

[7] **Third**, we consider a claim relating to the sentencing of Miller. Miller claims the trial court excluded mitigating testimony concerning his rehabilitative capacity during the sentencing proceeding. In reviewing this claim, neither the state or district court had the benefit of the

principle recently set forth in Skipper v. South Carolina, ____U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). At the Skipper sentencing hearing, at which the state sought and obtained the death penalty, the defendant attempted to introduce testimony of two jailers and one "regular visitor" to the jail to show that the defendant had "made a good adjustment" during his time spent in jail. The trial court refused to admit the testimony on the ground that it was irrelevant. Its decision was affirmed by the South Carolina Supreme Court. The United States Supreme Court reversed this decision, holding that the exclusion of this kind of testimony deprived Skipper of his right to place before the sentencer relevant evidence in mitigation of punishment. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Although the state trial court limited the testimony of a court appointed psychologist, the Florida Supreme Court

found no reversible error because the jury recommended life imprisonment. **Miller v. State**, 415 So.2d 1262, 1263 (Fla. 1982), **cert. denied**, 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983). This decision misses the point of the claim. The state trial judge overrode the jury recommendation of life and sentenced Miller to death. The question is whether the trial judge considered evidence as to rehabilitation to be mitigating.

The federal district court in denying relief to Miller on this claim noted that although the trial judge arguably restricted the psychologist's testimony concerning rehabilitative capacity, an analysis of the totality of the testimony showed that the witness did in fact testify about Miller's rehabilitative capacity.

There is some question about this decision. In a post-trial affidavit, the doctor states that in accordance with the trial court's limiting instructions, he "refrained from touching upon any matter having to do with rehabilitative capacity." He states that, if permitted, he would have testified that (1) Miller has

the intellect, motivation, and adaptive capabilities to be successfully rehabilitated, (2) the only requirement for furthering his rehabilitative capacities would be the development of a specially-tailored counseling program, (3) Miller has the family support and encouragement necessary for rehabilitation, and (4) Miller has an optimistic prognosis for rehabilitation. The doctor primarily testified about Miller's personality characteristics, particularly his tendency to take on the characteristics of the people around him. This testimony was given in an attempt to prove the mitigating factor that Miller had acted "under the substantial domination of another person" in committing the murder. Fla.Stat.Ann. § 921.141(6)(e).

Whether or not there was sufficient testimony as to rehabilitation, however, is not the consideration in not meeting the Skipper standard that should be applied in the case. The district court must determine whether the trial judge, in setting the death sentence, freely considered rehabilitation to be a

mitigating factor. The fact that the trial court heard the testimony is not enough. The district court must determine whether he gave it the significance it was entitled to under Skipper.

The judgments denying habeas corpus relief are vacated and the cases are remanded to the district court for reconsideration of these three issues under the correct standards. It may now be that further information being developed in this case will be relevant to these issues. The district court is, of course, free to consider any other claims that have been made or will be made in light of the ongoing proceedings in state and federal court, including the issue of whether any additional evidentiary hearings are needed.

VACATED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3175

EARNEST LEE MILLER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; RICHARD DUGGER, Superintendent, Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

No. 85-3185

WILLIAM RILEY JENT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; RICHARD DUGGER, Superintendent, Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

- - - - - - - - - -

Appeals from the United States Court
for the Middle District of Florida

- - - - - - - - - -

ON PETITION FOR REHEARING
(September 26, 1986)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by the appellees in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Peter Fay /s/
United States Circuit Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No. 86-1050

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT JENT

ELEANOR JACKSON PIEL
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New York, N.Y. 10036
(212) 575-0797
Attorney for Respondent
William Riley Jent

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Preliminary Statement

This is a brief in response to a Petition for Writ of Certiorari submitted by the Attorney General of the State of Florida to review a decision of the Eleventh Circuit which reversed a district court denial of the Writ of Habeas Corpus to two death sentenced prisoners convicted of murder in Pasco County, Florida. In reversing the district court on three different constitutional claims, the Court of Appeals remanded the cases to the district court to apply a different legal standard in reconsideration of these three issues.

In addition to the grand jury issue raised here, the court below ordered the district court to reexamine its denial of the ineffective assistance of counsel claim made by both petitioners and as to Respondent Miller only, to reexamine whether mitigating testimony was properly excluded from consideration by the state sentencing judge. The court below further noted that there was "new activity" [a new habeas corpus petition filed after the notice of appeal to the Court of Appeals] which could require the district court to consider additional issues in the light of the old issues which had been before it. Thus there is no final ruling on any of the issues involved, and any consideration of the claims by this Court would be premature.

There is even a more compelling reason, however, for this Court to deny the Petition for Certiorari because it is based on

untrue factual assertions by the petitioner.

The Claimed Issue Presented

As phrased by respondent, the issue posed in this petition concerns the propriety of ordering a review of grand jury minutes in camera of three eye witnesses to the murder by the district court judge where, says respondent, "There is no Specific Claim Before it That The Testimony Contains Material the Disclosure of Which is Mandated by the Fourteenth Amendment or any Other Amendment Working Through It."

As is shown in the attached Respondent Jent's Appendix (RA) containing the relevant pages from petitioner Jent's Petition for Habeas Corpus (RA-1-9), from his request to District Judge Carr to reconsider the claim that petitioner was entitled to the use of the grand jury minutes at trial (RA-11-24) and from the brief he submitted to the Eleventh Circuit on the issue (RA-25-30), it is clear that petitioner has attempted to mislead this Court in posing the question.

In his summary of his argument in his Petition for Habeas Corpus, Jent stated:

> "The petitioner was denied his right of confrontation and the ability to fully impeach the state witnesses, a constitutional correlary to a fair trial [citing cases]. The trial court's denial of the Motion for Access, without even agreeing to review the transcripts in camera, abridged petitioner's Sixth Amendment right to confront the three central witnesses against him...It also abridged petitioner's Eighth Amendment right to obtain possible evidence in mitigation of a possible death sentence." (RA-2,3)

In the body of the Petition, Jent said:

> "Petitioner thus showed a compelling need for the transcripts of these key witnesses. He asserted that access to them in this case was necessary to assure rights of due process and effective confrontation of witnesses under the United States Constitution." (RA-6,7)

and again,

> "Hubbard, Frye and Tirikaine all made prior exculpatory statements. If these witnesses made exculpatory statements before the grand jury, the State had an obligation under the Fifth Amendment to disclose their grand jury testimony to petitioner."(RA-9)

It is clear that Jent invoked the Fifth, Sixth and Eighth Amendments to the Constitution in connection with his claim that he was denied due process under those Amendments which were made applicable to the state of Florida by the Fourteenth Amendment. Thus the statement of the issue which asserted that neither Jent nor Miller had invoked the "Fourteenth Amendment or any other Amendment working through it" is in error since the claims made here of violations of petitioner's due process rights as expressed in the Fifth, Sixth and Eighth Amendment were such as were guaranteed to him by the Fourteenth Amendment. See Mooney v. Holahan, 294 U.S. 103, 112,113 (1935); Young v. Regan, 337 U.S. 235,240 (1949); Malloy v. Hogan, 378 U.S.1, 8 (1964); Lockett v. Ohio, 438 U.S. 586, 604. 606 (1978); Woodson v. North Carolina 428 U.S. 280, 302 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Davis v Alaska, 415 U.S. 308 315-318 (1974); Brady v. Maryland, 373 U.S. 83, 86 (1963).

REASONS THE PETITION SHOULD BE DENIED

1. The petition should be denied because it falsely alleges that

respondents made no appropriate constitutional claim below and did not request the District Court to inspect the grand jury minutes in camera.

a. Respondent Jent has set forth above the specific references to his constitutional rights, which he claimed were denied to him because of his specific need for the grand jury testimony of the witnesses who testified against him.

The Court of Appeals for the Eleventh Circuit has noted in its opinion that witnesses testifying against the defendants at trial had recanted their testimony since the filing of the their appeal to that Court (A-96) giving further support to Jent's contention that adverse testimony was forced from the unwilling prosecution witnesses and that their grand jury testimony could give further support to this contention.

b. Contrary to the allegations of the state, that neither Jent nor Miller "sought discovery of this material (grand jury testimony) in the district court nor asked the district court to conduct its own in camera review of the testimony," Jent indeed requested the district court to make an in camera inspection of those minutes. Proof of this is to be found in the Respondent's Appendix in a written Memorandum in Support of Motion for Reconsideration (RA-24) and in allegations set forth in Jent's brief on appeal in the Court of Appeals (RA-26,28,29). Nor is it significant that the request may have been made only by Jent since the cases were consolidated for hearing on the issues which

were joint and each of the convicted defendants was given the advantage of the other's arguments where applicable (RA-31).

2. The petition should be denied because the order of the Court of Appeals is not a final order or disposition of the case and accordingly, if there were an issue to be decided by this Court, it is not ripe for review. See O'Dell v. Espinoza, 456 U.S.430 (1982)

a. The case is presently pending before the district court and that court has ordered that the minutes of the grand jury be reviewed and is presently in the course of reviewing them. A stay sought of this action by the petitioner in this Court was denied as was a request to stay the mandate in the Court of Appeals.

3. The petition should be denied because the record does not present the question the petitioner claims is before the Court.

a. There is clear evidence that the Habeas petitioners did make a constitutional argument before the courts below, and that they did ask the district court to look at the grand jury minutes of the eye witnesses in camera and thus there is no evidence to support the question the state petitioner here poses if arguendo it were an appropriate question for consideration by this Court. In Conway v. Adult Authority 396 U.S. 107 (1969), this Court refused to rule on a "purely artificial" issue and called the request to do so an "unjustificable intrusion upon the time of this Court."

4. The petition should be denied because the issue advanced is frivolous. Where it is clear that the issue is wanting in merit in every respect as is clear here, this Court has not hesitated to reject a petition or an appeal on the grounds that it is frivolous. See Farrell v. O'Brian, 199 U.S. 89,100 (1905); United States ex rel Brown v. Lane, 232 U.S. 598 (1914); Brolan v. U.S. 236 U.S. 216 (1915).

Penalty Should Be Assessed against Petitioner

As has been set forth above, the petition in this case is so utterly without merit as to suggest that it is made only for purposes of delay and that a penalty should be imposed against the state petitioner for misrepresenting the facts to this Court and taking up the time of counsel and the Court in a completely meritless cause. See. Southern Railway Co. v. Gadd 233 U.S. 572, 581 (1915).

CONCLUSION

This Court should deny the petition and enter an appropriate order sanctioning the petitioner for the advancing of a frivolous petition replete with misstatements of fact.

Respectfully submitted,

ELEANOR JACKSON PIEL
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(212) 575-0797

Attorney for respondent
William Riley Jent

January 7, 1987

CERTIFICATE OF SERVICE

I, ELEANOR JACKSON PIEL, Counsel for Respondent Jent, and a member of the Bar of the United States Supreme Court, hereby certify that on the 8th day of Jannuary, 1987, I served one copy of the Brief in Opposition to Petition for Certiorari on Davis G. Anderson, Assistant Attorney General, 1313 Tampa Street, Tampa, Florida 33602, Howardene Garrett, Assistant Public Defender, Room 202, Pasco County Courthouse, 705 E. Liveoak, Dade City, Florida 33523, David L. Roll, Esq. Steptoe & Johnson, 1330 Connecticut Ave., N.W., Washington, D.C. 20036 and to Alan Wagner, Esq., Carlton Fields, P.O. Box 3239, Tampa, Florida 33601 by a duly addressed envelope with postage prepaid.

ELEANOR JACKSON PIEL
Attorney for Respondent Jent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-1050

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents.

RESPONDENT JENT'S APPENDIX

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THIS IS A CAPITAL CASE
EXECUTION IS SCHEDULED FOR
7:00 a.m., TUESDAY,
JULY 19, 1983

Prisoner's Name — William R. Jent
Prison Number
Place of Confinement — Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM RILEY JENT,

PETITIONER,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; CHARLES G. STRICKLAND, JR., Superintendent of Florida State Prison, Starke, Florida; and JIM HUNT Attorney General of the State of Florida,

RESPONDENTS.

Civil Action No. 83-860-CIV-T-13

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

RE 7

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

SUMMARY

1. William Riley Jent, petitioner, attacks the judgment of conviction for first-degree murder and death sentence entered against him by the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida. The Court is located in Dade City, Florida. Petitioner's execution is now scheduled for 7:00 a.m. on Tuesday, July 19, 1983.

2. Petitioner here raises five issues under the United States Constitution which are substantial and which have been exhausted in the state courts of Florida:

a. Petitioner was denied access to transcripts of grand jury testimony of the three central witnesses of the State. The only direct evidence linking petitioner to the crime, or to the aggravating circumstances on which the death sentence was based, came from those three witnesses. Both, however, had given prior exculpatory and other statements inconsistent with their testimony at trial. In these circumstances, petitioner made a showing of compelling need for the transcripts. The petitioner was denied his right of confrontation and the ability to fully impeach the state witnesses, a constitutional correlary to a fair trial. See Jencks v. United States, 353 U.S. 657 (1957); Palermo v. United States, 360 U.S. 343 (1959); Goldberg v. United States, 425 U.S. 94 (1976). The trial court's

RE 6

denial of the Motion for Access, without even agreeing to review the transcripts in camera, abridged petitioner's Sixth Amendment right to confront the three central witnesses against him. See David v. Alaska, 415 U.S. 308 (1974). It also abridged petitoner's Eighth Amendment right to obtain possible evidence in mitigation of a possible death sentence. See Eddings v. Oklahoma, 455 U.S. 104 (1982). A new trial should be granted with access to these transcripts.

b. The trial judge denied the petitioner the benefit of affirmative alibi testimony by permitting a witness subpoenaed to a deposition to plead the Fifth Amendment when the State had already entered into a plea bargain with the witness which would, upon sentence, immunize her against prosecution. The refusal of the court to grant petitioner continuance of the trial or to move forward the witness' sentence further denied him the affirmative testimony(as was to later appear by the witness' affidavit attached to the post-conviction collateral relief motion not before this Court at this time) and accordingly deprived petitoner of the due process under the Fourteenth Amendment. See Washington v. Texas, 388 U.S. 14, 19 (1967), United State v. Hammond, 598 F.2d 1008, 1012 (5 Cir. 1979).

c. Prejudicial purported expert testimony on hair analysis was permitted over objection which improperly

[Carroll], R 2441 [Marvin].*

11. It was after Carroll heard on the radio the finding of a burned girl that Carroll told Tina Marvin to "sell everything we can, we're leaving" (R 2438 [Marvin]) and so they left town a day or so later and went to Michigan in the 1967 blue Buick Sabre which Bobby Dodd had sold to Carroll on July 12, and Carroll had given to Tina Marvin when he returned from the night out with Carroll (R 2443 [Marvin]).

Ruling

At the conclusion of the hearing for a new trial, the court denied the motion in its entirety.

The Court's Findings

The judge found that aggravating circumstances existed--the murder was especially heinous. In making this finding, he relied in part on evidence at petitioner's trial that the victim, prior to being ignited, attempted to get up and was knocked back down, as well as on evidence concerning the rape

Direct Appeal

1. Petitioner appealed the conviction and sentence to the Supreme Court of Florida, raising several issues, including the following:

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* A milk jug had been noted at the scene where the body was found in which traces of gasoline were found (R 1510, R 1517, R 1534).

a. That the trial court erred by failing to provide him with transcripts of the grand jury testimony of three eyewitnesses;

b. It was error to refuse a continuance to defendant who sought to depose a material witness prior to trial. That witness, who had an insulating plea bargain already negotiated with the prosecutor, was able to plead the Fifth Amendment because her sentence was deferred until after the defendant's trial.

c. The evidence was inherently incredible and the court was asked to reweigh the evidence and enter a different verdict.

d. It was an abuse of discretion to permit the introduction into evidence of a hair sample found near the scene of the crime three days later on the basis of an "expert" witness who found a similarity between the unknown sample and a hair from the petitioner's head.

e. The court erred in refusing to bar cameras from the courtroom at the request of the defendant's counsel.

f. The fact that the deceased was never identified improperly subjected the petitioner to double-jeopardy.

g. The denial by the court of the new trial based on the newly discovered evidence was an abuse of discretion.

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Supporting Facts

1. Petitioner predicated his defense upon the lack of credibility of Hubbard, Frye, and Tirikaine, the three eyewitnesses against him. Their testimony was central to the State's case and demand for the death penalty, but all had made unsworn and inconsistent statements to the police, including an exculpatory statement that they had not witnessed any killing. (R at 690, 693-94, 699, 1207-10, 1553.) All had reason to fear that they could be prosecuted for their own roles. (R 693-694, 1208.) Frye at one point was arrested as an accessory after the fact, while Hubbard was in protective custody when she first told the story she recounted at trial. All women appeared before the grand jury under oath at a time when the events in question were fresh in memory.

2. Prior to trial, petitioner's counsel moved for production of transcripts of the grand jury testimony of the State's three central witnesses, Glinna Frye, Patricia Tirikaine, and Carlena Jo Hubbard. (R 215-17.) The motion cited deposition testimony showing that the three witnesses in question had previously given different versions of the events, and that one had acknowledged receiving promises of leniency from the State in return for her testimony in this case. (R 216.) Petitioner thus showed a compelling need for the transcripts of these key witnesses. He asserted that access to them in this case was necessary to assure rights of due process and effective confrontation of witnesses under the

United States Constitution. (R at 217.)*

3. The State objected to the motion, claiming that the defense was on a "fishing expedition" and cited the generalized interest in grand jury secrecy. (R at 2132-35.) During argument on the motion, petitioner's counsel requested that the trial court at least review the transcripts in camera before denying the motion. (R at 2130-32.) The court denied the motion saying only that "a sufficient predicate" (showing of need) had not been made. (R at 2138.)

4. The State's case on both guilt and sentencing derived from the testimony of the two witnesses concerned. Indeed, the aggravating factor on which the trial court based petitioner's sentence of death under Florida's death penalty statute (heinous crime) was supported solely by testimony from the ~~two~~ three witnesses in question.

5. The Florida Supreme Court summarily affirmed the decision to withhold the grand jury transcript ruling that (a) the defendant had failed to lay "a proper predicate" for the testimony based on something other than surmise about the testimony's contents, and (b) the defense's subsequent attack on the credibility of the State's witnesses by cross-

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* Moreover, grand jury testimony in Florida differs from other witness statements. Like Fed. R. Evid. 801(d)(1), on which it is modeled, the Florida statute exempts prior sworn statements from the hearsay rule. Fla. Stat. Ann. § 90.801 (2) (a). Thus, prior grand jury testimony can be considered by the jury for the truth of the matter asserted.

examination "obviated that need for their prior [grand jury] testimony." Jent v. State, 408 So. 2d at 1027-28

Legal Bases for the Claim

6. While the Constitution may not guarantee an ordinary criminal defendant access to grand jury transcripts of his chief accusers, different considerations apply where the ultimate penalty of death is sought--and where the Eighth Amendment therefore comes into play. The unique nature of capital punishment imposes a correspondingly unique need for reliability in the determination that death is the appropriate penalty in a particular case. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion of the Chief Justice); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Justice Stewart). As the Supreme Court reiterated just last week, "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, No. 81-1893, slip op. at 5-6 (U.S. July 6, 1983).

7. These Eighth Amendment considerations apply to the determination of guilt or innocence of a defendant charged with a capital offense--and certainly to the proof of any aggravating factor on which the subsequent death sentence is based. Cf. Gardner v. Florida, 430 U.S. 349, 359 (1977).

8. In this case, the trial court has prevented a defendant from presenting to the sentencer (jury and sentencing judge) evidence potentially relevant to the other side of the

sentencing equation--the aggravating factors relied on by the State. By erecting an insurmountable barrier between grand jury transcripts and defendants facing a death penalty, the Florida courts have precluded such defendants from making one type of challenge to the evidence asserted in support of death.

9. The denial to petitioner of access to the grand jury testimony of the State's principal witnesses also infringes his Sixth Amendment rights. The decision in United States v. Augenblick, 393 U.S. 348, 356 (1969) suggests that in a proper case, the failure to produce a prior statement of a prosecution witness in a state criminal proceeding may violate the Sixth Amendment. See Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring). Also, the Supreme Court previously has held that a state's generalized interest in the secrecy of juvenile court records does not outweigh a burglary defendant's Sixth Amendment right fully to test the credibility of the chief prosecution witness. Davis v. Alaska, 415 U.S. 308 (1974).

10. Hubbard, Frye, and Tirikaine all made prior exculpatory statements. If these witnesses made exculpatory statements before the grand jury, the State had an obligation under the Fifth Amendment to disclose their grand jury testimony to petitioner. Brady v. Maryland, 373 U.S. 83 (1963).

11. In this case the State's opposition to petitioner's request for access to the grand jury transcript was solely based on its generalized interest in grand jury secrecy. By contrast, the defendant in a capital case has the most

compelling interest imaginable in testing the credibility of the witnesses against him--his life. A holding that the Constitution affords less protection to a defendant in a capital case than to a defendant indicted for burglary is irreconcilable with Davis v. Alaska, supra.

12. Here, petitioner was denied a central weapon for his defense: sworn transcripts of the three witnesses who provided the only evidence linking petitioner in any way with the crime or with the aggravating circumstance on which his sentence of death was based. The trial judge even refused to look at the transcripts in camera--though under Florida law the transcripts could have been introduced at trial for the truth of the matters asserted therein.

II. The Denial by the Trial Judge of a Continuance of the Trial so Defense Counsel Could Take the Deposition of Samantha Carver, a Person Identified by the Three Testifying Trial Witnesses as Having Been Present With Them the Entire Evening During Which the Crime Took Place Deprived the Defendant of his Due Process Rights to a Fair Trial

Supporting Facts

1. Defense counsel subpoenaed Samantha Carver to a deposition on December 13, 1979, four days before the trial of petitioner was to commence. Since she had not testified for the State and was supposedly present all through whatever occurred on July 12-13, 1979, he had reason to believe her testimony would be favorable. On that same day she entered a plea of nolo contendere pursuant to a plea bargain which provided:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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WILLIAM RILEY JENT,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondents.

----------X

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S OPINION AND ORDER OF APRIL 30, 1984

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appends a timetable listing of the events as "Exhibit A" to demonstrate how this miscarriage of justice occurred.

II

This Court has Misappraised Petitioner's Contention that He was Deprived of Due Process by Reason of the Court's Denial to Him of the Transcripts of the Grand Jury Testimony.

This Court has mistakenly interpreted petitioner's contention to be that the claimed constitutional deprivation involving the denial to him of the grand jury transcripts of the three witnesses who testified against him at trial (and/or a perusal of same by the court) is based on a "federal constitutional right to the discovery of grand jury transcripts".

Throughout this habeas corpus petition, the petitioner has affirmatively alleged under oath and with the support of his counsel, that the state has frightened witnesses into perjured testimony before the court. It is this contention that raises this issue to Constitutional proportions, and requires at the very least that this Court review those grand jury minutes in camera to finally determine that these charges must be true, based on what counsel believes to be further gross inconsistencies in the witnesses' first testimony under oath concerning the alleged murder by petitioner.

Based upon the patent inconsistencies in the testimony of the three eye-witnesses at trial -- inconsistencies between their prior deposition testimony (as to Glenna Frye, inconsistencies between deposition testimony taken in September and then again in December and again at trial) and inconsistencies among the witnesses' testimony -- it is petitioner's position that the trial testimony was perjured and that the perjury was solicited by the state.[2] It was secured by the state by keeping all three in "protective custody" from July 1979 through the trial in December 1979 (a period of six months) (R 632, 643-645, 852) and by threatening each of them with the charge of accessory to a murder if their testimony was not satisfactory. Although this Court has considered petitioner entitled to a hearing because of allegations of threats to Tina Marvin and Elmer Carroll, it has not noted the record references at the trial to the prosecution's threats made to each of the so-called three eyewitnesses: Glenna Frye testified under oath that prior to her testimony which incriminated Jent, she was being held on the "criminal charge of

2. Moreover, this Court may take notice of inconsistencies in the testimony of the witnesses in the Jent trial as compared with the testimony of some of the same witnesses at the trial of defendant Miller whose separate trial is also before this Court.

accessory after the fact to a murder" (R 642). Carlena Jo Hubbard was threatened by Detective Fitzgerald, that if she did not talk, "you'll be an accessory or something like that or something to a murder" (R 293).[3] The other detective, Jack Armstrong, put the threats to Patricia Tirikaine, who testified that she would be charged as an "accessory" [to a murder] if she did not help him (R 540). Similar threats were made to a non-testifying witness, Samantha Carver who, because she did not testify against Jent and Miller, was charged with the crime of accessory after the fact to murder (CR 45, 46). See infra for further discussion of this witness.

The inconsistencies in the testimony of the three witnesses, dramatically attest to the fact that they were not and could not be telling the truth. In order to make this clear to the Court, petitioner will here detail some of the inconsistencies to show that they should have alerted the trial court to make the grand jury testimony available to defense counsel and should alert this Court at last to do so.

The unreliability of the testimony along with its inconsistencies is one time more described in detail in order to

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3. The threat must be read as meaning that each of these women were expected to say that Jent (or Jent and Miller) had committed this crime of murder, even if it were not true.

show this Court that availability of the grand jury minutes -- to show what the witnesses said in August 1979 about their memory of what happened in July 1979 -- was crucial both to test the witnesses' veracity and to show the prosecutorial misconduct which pervaded the whole state proceeding, viz.:

Even without considering the disability of these witnesses -- owing to their self-confessed and otherwise established incapacity brought on by alcoholism, drug addiction or mental illness as set forth in the Supplemental Memorandum (p.7) -- the glaring contradictions in their testimony cast grave doubt upon its truth and probative value. This required that the record be searched for all their testimony given under oath. Each of them told the police two and sometimes three versions of the story, sometimes implicating Jent, other times attesting to his innocence. We do not know how they handled this in the grand jury. Each of them eventually said (it is submitted here as the result of threats) that Ernie Miller and William Jent, beat up "Tammy" and burned her body, but beyond those facts, they could agree on virtually nothing.

The contradictions began from the moment "Tammy" arrived on the scene. These inconsistencies are germane to the consideration of whether any "Tammy" came to the alleged party or indeed was ever killed by petitioner. See infra. Ms. Tirikaine swore

that "Tammy" came to the Caboose Bar that night with Glenna Frye and Ernie Miller (R 473, 474). But Ms. Frye said she never saw "Tammy" at the bar (R 648, 649). Ms. Hubbard could not make up her mind one way or the other (R 247, 248). And in a pre-trial deposition, Ms. Tirikaine contradicted herself and said "Tammy" wasn't with anyone at the bar (R 749).

All three witnesses claim to have been driven by Ernie Miller from the bar to the site where "Tammy" was beaten.

Ms. Frye claimed a man named "Johnnie" was also in the car (R 659). Ms. Hubbard said not "Johnnie" but "George" went with them (R 248). Both said "Tammy" wasn't in the car. But Ms. Tirikaine swore "Tammy" was in the car (R 476). If they actually witnessed "Tammy's" murder, which we here submit they did not, they should have remembered if they had just been in the car with her.

Glenna Frye claimed "Tammy" arrived at the river in a white van driven by a man named "Big Bob" (R 666). Ms. Hubbard said she didn't see "Tammy" until she was being beaten (R 258, 259). Ms. Tirikaine stated "Tammy" arrived in Ernie Miller's car with the three state witnesses mentioned above (R 476). What did they say before the grand jury?

Ms. Frye testified she had never met "Tammy" before she arrived at the river (R 648), but Ms. Tirikaine said that

Ms. Frye and "Tammy" were friends (R 551).

Pat Tirikaine also said that Glenna Frye and George Mortola smoked marijuana on the way out to the river (R 478). In another contradiction, Ms. Frye testified that they had no marijuana and told of an unsuccessful trip to Dade City in search of the drug (R 656, 662).

When the group first arrived at the river, Ms. Frye said that she and Ernie Miller let the others out of the car and went back to Miller's to take some more crystal tea (R 663, 664). Ms. Hubbard testified, however, that Miller parked the car and everyone got out (R 251).

Once these witnesses finally agreed that they were all present at the river, they disagreed again. All could agree they had some source of lighting at the river. Ms. Tirikaine said it was a fire (R 482). Ms. Frye said the only light was candles they had brought and spread around (R 672, 673). Ms. Hubbard says there was a fire (R 247). What did they each tell the grand jury about the visibility?

Even the crucial testimony concerning the beating differs. Ms. Frye says "Tammy" was on the ground during the entire incident (R 676-681). Ms. Hubbard swore that Jent and Miller held "Tammy" up and hit her (R 260, 261). Ms. Tirikaine

said "Tammy" was down on a blanket (R 489, 490). Ms. Hubbard never mentioned seeing either man using a stick to hit "Tammy". Ms. Tirikaine said only Jent used a stick (R 500, 501). But Ms. Frye says she looked for and found a stick for Ernie Miller, gave it to him and saw only Miller use it (R 678).

When the group left the river, none of the witnesses saw what happened to the girl that supposedly had been beaten. As they drove away, Ms. Frye said the group saw the white van she mentioned stuck in the mud and stopped to push it out (R 685-687). Neither Ms. Tirikaine nor Ms. Hubbard remembered this incident, and both claim not to have seen a white van at all that evening (R 267, 268, 504).

All three witnesses agreed that the group went back to Ernie Miller's house after leaving the river. But their versions of what took place there as sworn to in their depositions were incredibly different. What was their testimony before the grand jury?

Glenna Frye and Pat Tirikaine, in their first depositions told of the group going in the house, staying there while Frye took a bath and Tirikaine got sick (R 688, 689, 506-508). Ms. Hubbard testified differently -- that the rest of the group waited in the car while Ernie Miller ran in the house to get something.

She claimed the entire stop lasted only "a couple of seconds" (R 268, 269). Almost three months later (after the Miller trial, his conviction and the jury recommendation of life imprisonment) two of the three were sworn and deposed again. This time the stories changed. Ms. Frye told a graphic tale of "Tammy" being taken from the trunk of the car and raped by Miller, Jent and two other men (R 2729). Ms. Hubbard told of being in an almost dream-like state, remembering disjointed bits and pieces. She seemed to know what she was supposed to say, but for some reason she had difficulty with it. Specifically, she said:

> "I can't say I saw all them screwing that girl, I can't say that. . . All I can say is that I can see flashes of it, you see what I'm saying, just like I don't know how to explain it (pausing) - now I can see Ernie, you know, doing something to this girl, but it's kind of hazy." (R 774)

Pat Tirikaine, the only one of the three to tell the same version of the stop at Ernie's in all of her statements, testified that no rape took place (R 760). She was not called as a witness in the prior Miller trial.

After the group allegedly left Miller's house, all three witnesses told of driving to the Richloam Game Preserve and there seeing "Tammy's" body burned. But once again, only some of the crucial incriminating testimony was given by all

three. When they arrived, Ms. Frye said they all immediately got out of the car and followed Miller and Jent to the rear of the car. She said they all stood and watched as Miller lifted "Tammy" from the trunk (R 693, 694). Ms. Tirikaine said only Miller and Jent got out of the car initially. The others waited in the car a few minutes until they saw two men carrying "Tammy" past the car towards the front; they they got out (R 515). Ms. Hubbard said they waited in the car a few minutes but when they finally got out, Miller was still around back of the car (R 273). During the first set of depositions, none of the three said anything about seeing any signs of life from the body of "Tammy" at the Game Preserve. Nor did anyone say that Jent struck "Tammy" there. During her second deposition, Ms. Frye testified for the first time that "Tammy" tried to stand up just before she was burned, and Bill Jent struck her (R 2739). Neither Ms. Hubbard nor Ms. Tirikaine, both of whom stood close by, saw this event (R 756, 793). How was this handled in their grand jury testimony

In additional testimony in another criminal case, Florida v. George Mortola, 79-867, Glenna Frye testified on December 19, 1979 before Judge Ray E. Ulmer at a trial[4] in Pasco

4. A copy of Ms. Frye's testimony at this trial secured since the July 12, 1983 hearing is attached as "Exhibit B" and referred to here as "B" followed by page number.

County that the events she described took place on July 14 and that she had continouusly since about then been kept in jail. She testified at that trial that early that morning she went to the river with Ernie Miller, George Mortola, Bill [Jent], Samantha [Carver], C. J. [Hubbard], Johnny [?], Ricky [Camancho] and Patricia [Tirikaine] and that she saw a girl named "Tammy" there who came with "Tampa Bill" (B 4, 5). She saw a fight there between "Tammy" and the two petitioners (B 6).

Contrary to the testimony she had just given the day before in the Jent trial about the rape which followed, she said they then went to Ernie's house for "a short time" (B 9). There was no mention whatsoever of the rape she had testified to on December 18, 1979, the day before, when she said that George Mortola was the one who went "second" in the raping of "Tammy" (R 1660, 1651). She also mentioned nothing about "Tammy" becoming conscious just before she was burned and being hit by Jent as she said it had happened in her testimony of the previous day (R 1673, 1674), (B 10).

At the Mortola trial, Ms. Frye admitted that she had never told the state about any murder until she had been promise a "deal" which involved immunity from prosecution and that

Detectives Armstrong and Fitzgerald had threatened her with headlines in the newspaper "Glena Frye to fry" (B 24).

The usefulness and materiality of the grand jury testimony, which must involve still another version of the facts, in order to show what the witnesses said had happened barely a month after the event is self-evident. Against the background of the serious accusation of prosecutorial misconduct, the minutes became imperative.

In this connection (prosecutorial misconduct) additional evidence was adduced at the post-trial Rule 3.850 hearing through the testimony of Leonard Holton, petitioner's trial lawyer, that he (Holton) was prevented from speaking with Glenna Frye during the course of the trial by the active interference of the prosecutor's office and a criminal threat against him (Holton)[5] (CR 1062). Holton testified to this at the Rule 3.850 hearing in pertinent part as follows:

> Holton: "There was an incident involving Glenna Frye. I had been given reason to believe that she might have different testimony for us in

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5. This testimony was adduced under the claim of ineffective counsel and was at least some evidence that the state had interfered with counsel's advocacy by threatening and attempting to intimidate such counsel.

Mr. Jent's trial from what she offered in Mr. Miller's trial. [CR 1061]

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I went to the State Attorney's office. I don't know why I thought she was there -- maybe I had some information she was there . . . I located her in the State Attorney's office and I attempted to speak with her. Mr. Cope, who is one of the prosecutors in the case, interceded and prevented -- in fact, ordered me not to speak to her, ordered me to leave the office . . . . she appeared to be visually upset and with the information I had received I thought I should try to speak with her. [CR 1062]

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She was shuffled into a room in the prosecutor's office, the door was closed. I attempted to enter the room. I was advised not to enter the room. I was then threatened with arrest for Trespass if I did not leave their office at that time.

Q Who said that to you?

A Charles Cope [One of the prosecutors]." (CR 1063)

Counsel for petitioner submits that the above testimony received in evidence without objection or denial at the Rule 3.850 hearing from Leonard Holton, a lawyer and officer of the court under oath, establishes cogent basis for petitioner's claim of prosecutorial misconduct at the trial of the case before the issue raised by the affidavits of Tina Marvin or Elmer Carroll

ever got on the record. Moreover, in view of this evidence, this Court has an obligation to at least review the grand jury testimony of the so-called eyewitnesses in camera and further to order an additional hearing to determine whether that interference with the defense of the defendant Jent in the middle of his trial as testified to by his lawyer did not amount to prosecutorial misconduct in itself warranting a new trial for petitioner. This is a request that this Court reconsider petitioner's first claim for relief and grant a hearing on the larger issue of prosecutorial misconduct in connection with improper pressure on the three testifying witnesses and in that connection review their grand jury testimony as well as other statements taken by the prosecution and never previously revealed to defense counsel.

III

The Prosecution's Dealing with Samantha Carver Wanted as a Witness for the Defense is Further Evidence of Prosecutorial Misconduct.

Petitioner seeks reconsideration of this Court's ruling on the impropriety of the trial court's refusal to continue the trial in order to obtain Samantha Carver's testimony.

This reconsideration is sought in connection with the

IN THE

United States Court of Appeals

For the Eleventh Circuit

No. 85-3185

WILLIAM RILEY JENT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; CHARLES G. STRICKLAND, Jr., Superintendent of Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

On Appeal from the United States District Court
for the Middle District, Tampa Division

BRIEF FOR PETITIONER-APPELLANT
(HABEAS CORPUS)

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Point IV

THE DENIAL OF THE GRAND JURY TESTIMONY TO DEFENSE COUNSEL OF THE THREE "EYEWITNESSES" DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AS WELL AS HIS GUARANTEE OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Jent's counsel made a pretrial written demand for the transcripts of the grand jury testimony of the three eyewitnesses who had testified against the defendant before the grand jury. Their depositions had been taken in September 1979, a month or so after they had testified about events which took place in July 1979.

The specific request made clear with record references to the depositions taken, the particularized need for the grand jury testimony, invoked the relevant Florida law on the subject (F.S. 905.27) and requested the transcripts in the interest of the defendant's due process rights (R 203-205)*.

This Court has had recent occasion to examine the issue and policy of grand jury secrecy as it affects public policy in In re Petition to Inspect Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984). This Court made clear there that other factors in

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* The request read in pertinent part:
"a) On September 18, 1979, your undersigned took the deposition of GLINNA FRYE. During deposition she admitted to previously telling at least two (2) significantly different versions of the happenings on the night in question (different than her testimony at deposition). See transcript of deposition of GLINNA FRYE, pages 63, 64, 65. GLINNA FRYE also acknowledged being the beneficiary of certain promises of leniency from the state in return for her testimony in this case.
b) On September 18, 1979, your undersigned took the deposition of PATRICIA TIRIKAINE. During that deposition she admitted to making previous statements to law enforcement officers that were grossly inconsistent with her testimony at the deposition (see transcript of deposition of PATRICIA TIRIKAINE, pages 62, 63, 65, 66).
c) On September 21, 1979, your undersigned took the deposition of CARLENA JO HUBBARD. During that deposition she admitted to making previous statements to law enforcement officers that were grossly inconsistent with her testimony at the deposition (see transcript of deposition of CARLENA JO HUBBARD pages 68, 69, 70, 71, 72, 73).
8. F.S. 905.27 provides for the disclosure of testimony of witnesses before the grand jury for the purpose of "ascertaining whether it is consistent with testimony given by the witness before the court" or for the purpose of "furthering justice." In this case there appears a substantial likelihood that these witnesses' Grand Jury testimony will differ from that given this court at trial.
9. The granting of this Motion will insure that the defendant is accorded his rights to due process,and effective confrontation of witnesses as guaranteed by Article I, Sections 9 and 16 of the Florida Constitution and the Fifth,Sixth & Fourteenth Amendments to the U.S. Constitution." (R 204).

the interests of justice may outweigh the long established policy of grand jury secrecy. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 219 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681, 682 (1958); United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983) [disclosure permitted upon a showing of particularized need]. See United States v. Luizzo, 739 F.2d 541 (11th Cir. 1984) [disclosure permitted under Jencks Act after testimony at hearing or trial of witness and when so directed by court preliminary to or in connection with a judicial proceeding where there is showing of particularized need]. cf. United States v. Baggot, 463 U.S. 476, 483 (1983) [no disclosure permitted for a non-litigation function].

The showing made by Jent's counsel involved promises by the prosecution of leniency to all the witnesses and a representation that their versions of the event were mutually inconsistent and that each witness had given the state different versions of the events. Thus counsel had established a compelling and particularized need for the transcripts to assure the rights of due process and effective confrontation. Moreover, he argued that in a capital case his due process claim becomes even more important in order to assure the correct imposition of the ultimate penalty. See Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Gardner v. Florida, 430 U.S. 349, 359 (1977).

Petitioner argued that failure to produce a prior statement of a witness upon request violates a defendant's Sixth Amendment right to effective advocacy and interferes with his right to adequate cross-examination. See United States v. Augenblick, 393 U.S. 343, 362, 363 (1969); Palermo v. United States, 360 U.S. 343, 362 (1959); cf. Jencks v. United States, 353 U.S. 657 (1957), Dennis v. United States, 384 U.S. 855 (1966).

The American Bar Association standards for Criminal Justice (Second Edition 1982) Standard 11-2.1(iii) provides that the

prosecutor upon request shall provide to defense counsel

> "(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses."

The notes on the section refer to "developments in the trend toward liberalizing access to grand jury minutes." This section has been recommended by the National Prosecutors Standards, NDAA, National Prosecution Standards 13.2(A)(3), by the National Advisory Commission Standards, NAC, Courts 4.9(2) and by the Uniform Rules of Criminal Procedure, NCCUSL, Uniform Rules of Criminal Procedure 421(a).

Commencing with Alford v. United States, 282 U.S. 687, 691 (1931) and before, courts have held that the cross-examination of a witness is a matter of right and a part of due process; there must be liberal lee-way permitted to the cross-examiner in the exercise of that right. Certainly the prior testimony of a witness before a grand jury testifying to the same or similar facts to what he or she will testify to at trial is relevant data for the cross-examiner to review. There is a conflict in the law of the fifty states as to whether the grand jury testimony of a witness at trial is required to be turned over to defense counsel after that witness has testified and whether a particularized showing is necessary before such a rule comes into play. (See Annotation 20 ALR 3rd 1. and pocket parts for a comprehensive survey of such rulings). Counsel asserts here that disclosure of the testimony was his constitutional due process right.

Moreover, in the case at bar, all the witnesses testified to having given prior exculpatory statements and had denied that a murder had taken place. If these statements were made or suggested before the grand jury there would be additional grounds under Brady v. Maryland, supra. See United States v. Bagley, __U.S.__ (July 2, 1985) for the production of that testimony. See Galtieri v. Wainwright, 582 F.2d 348, 352 (5th Cir. 1978 en

An adequate showing of the serious impairment of the defendant's rights can not be made until the grand jury testimony is actually produced.

Petitioner had asked the state court and the court below to review the testimony in camera. At the very least, petitioner has a right to have a court preliminarily review the grand jury minutes to determine whether petitioner's speculations are correct. See United States v. Morris, 582 F.2d 436 (5th Cir. 1976).

The court below nonetheless concluded on this issue that

> "... petitioner has failed to show with particularity the usefulness or materiality of the grand jury transcripts. The prosecution stated that the transcripts did not contain any exculpatory information. The fact that the grand jury testimony is alleged by the petitioner to contain some inconsistencies does not without some factual support, convince this Court that the trial court abused its discretion in deciding not to review the transcripts in camera" (CFH 385).

The above quotation from the court puts counsel in a Catch-22 position. There is no way defense counsel can tell the court what details might be found in the grand jury testimony of the alleged eyewitnesses to the murder since that testimony is secret. It is reasonable to assume that one serious inconsistency must appear — concerning Glinna Frye's testimony on the subject of the rape. Such testimony was omitted by her in her deposition taken September 18, 1979, not mentioned at the Miller trial, but first developed at a subsequent deposition in Jent on December 5, 1979 (R 2711-2758). She did not relate it earlier, she said, because she was afraid (R 2750, 2751). What did she say at the secret grand jury session where her testimony was supposedly protected?

In a record fraught with incidents of claimed prosecutorial misconduct, neither court nor counsel can rely on the blanket representation of the state attorney that there is no exculpatory information in those transcripts.

Although it is misconduct for a prosecutor to fail to disclose evidence favorable to an accused, in view of the secrecy here of the minutes, petitioner may be executed with only a suspicion and in ignorance of the

existence of such misconduct. cf. United States v. Schaflander, 119 F.2d 1024, 1026 (9th Cir. 1983).

In this case the prior request of defense counsel for this information mandates at the very least, that the court examine the minutes of the testimony of the three witnesses before the grand jury to determine in fact, the relevance of that testimony for impeachment in cross-examinaton and further to determine whether it is Brady material. cf. Maddox v. Montgomery, 718 F.2d 1033 (11th Cir. 1983).

Point V

THE TRIAL COURT'S DENIAL OF A CONTINUANCE OF THE JENT TRIAL FOR THE PURPOSE OF DEPOSING SAMANTHA CARVER DENIED AND INTERFERED WITH JENT'S CONSTITUTIONAL RIGHT TO CALL A WITNESS IN HIS DEFENSE. THE COURT BELOW MISAPPRAISED THE FACTS AND LAW IN THIS CONNECTION

To the state court on direct appeal and to the court below petitioner contended that the trial court had abused its discretion in refusing a continuance to defendant so that he could have the benefit of the deposition testimony of Carver who had been named by all the other eyewitnesses as a person present at the scene of the murder involving the defendants (CFH 24-26).

Petitioner also submitted an affidavit of Carver attached to his Rule 3.850 motion in the trial court supporting his request for a hearing on the issue of prosecutorial misconduct and suppression of exculpatory evidence (CR 83, 84). See Point II, supra .

The district court below ruled that the refusal of the state court judge to grant a continuance of the Jent trial until Samantha Carver had been sentenced on her nolo contendere plea (to being an accessory after the fact to a murder, and her deposition ~~Amendment~~ Taken) was not an abuse of discretion (CFH 387).

The court correctly noted that Carver "entered into a plea agreement with the state immediately before the petitioner's trial but was

sides and then if I let you reopen as to that, I will consider it at the time. But I'm not in a position to determine whether the probative value of that is so necessary and needed so that it would outweigh many of the factors in Rule 403 that the Court should consider.

Now, also -- let's take up one other matter. You have not made such a motion, Ms. Garrett. Would you like to adopt a procedure, the two of you, that you automatically adopt any motion of the other unless you opt out?

MS. GARRETT: Yes, Your Honor, I would care to adopt that procedure.

MS. PIEL: I concur.

THE COURT: Would you like to do the same for the State, Mr. Anderson?

MR. ANDERSON: Absolutely, Your Honor.

MR. KOTLER: Yes, Your Honor.

THE COURT: All right, I will consider any objection made by either party, since this is a joint hearing, to be automatically adopted by the other party unless you opt out at that time.

Now, the only other pending motion, unless you can point out some other, is a motion made on behalf of Jent for some sort of order of protection of the State prisoner Carroll. Again, I'll take that under consideration at this point and we'll see how things go, but I would not anticipate